TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 69.

YOSEMITE GOLD MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, AND HARRY ARGALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 20, 1908.

(20,312.)

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In the Supreme Court of the State of California.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, and JACOB MILLER, Plaintiffs and Respondents,

vs.

YOSEMITE GOLD MINING AND MILLING COMPANY (a Corporation), Defendant and Appellant; HARRY ARGALL and F. L. ARGALL, Defendants and Respondents.

Transcript on Appeal.

Crittenden Hampton, and J. P. O'Brien, Attorneys for Plaintiffs and Respondents.

F. W. Street, W. C. Kennedy and Will M. Beggs, Attorneys for Defendants and Appellants.

Filed this — day of January, A. D. 1903.

FRANK C. JORDAN, *Clerk*,

By —— ——, *Deputy Clerk*.

1 In the Superior Court of the County of Tuolumne, State of California.

E. L. EMERSON, MRS. A. L. EMERSON, and F. F. BRITTON, Plaintiffs,

vs.

R. S. MCWHIRTER, JACOB MILLER, HARRY ARGALL, and F. L. ARGALL, Defendants.

The Plaintiffs Complain and allege:

I.

That all the plaintiffs and defendants Jacob Miller, Harry Argall and F. L. Argall, now are and for a long time hitherto, have been the owners of and entitled to the possession of all that certain mining claim, being all of that certain lot, piece or parcel of
2 land, situate, lying and being in Tuolumne Mining District, Tuolumne County, State of California, and bounded and described as follows, to-wit: Being all of the Slap Jack mine or mining property, situate at Second Garrote, about one-fourth of a mile southwest of the Big Oak Flat and Yosemite road, said claim being fifteen hundred feet long by six hundred feet wide.

II.

That the consent of co-owners and defendants Jacob Miller, Harry Argall and F. L. Argall herein, could not be obtained to join in this complaint as plaintiffs, and they and each of them are made defendants herein, that justice may be done in the premises.

III.

That said Harry Argall, F. L. Argall, Jacob Miller, E. L. Emerson, Mrs. A. L. Emerson and Frank F. Britton, claim the title to all of the aforesaid Slap Jack mine and mining property hereinbefore described.

IV.

That said defendant R. S. McWhirter, claims an estate in aforesaid mine and mining property, adverse to all the aforesaid plaintiffs, and defendants set forth in Allegation III of this complaint.

V.

That the claim of said defendant McWhirter is totally without any right, title or interest whatever, and that said McWhirter
3 has not any right, title or interest whatever in the said land or mining claim or premises whatever, or in any part thereof.

Wherefore, plaintiffs pray:

First. That said defendant R. S. McWhirter may be required to set forth the nature of his claim, and that all adverse claims of said McWhirter may be determined by this Court.

Second. That by said decree it be declared and adjudged that said defendant McWhirter, has no estate or interest whatever, in or to said land, mine or premises, and that the title of said owners as set forth in Allegation III of this complaint is good and valid.

Third. That the said defendant McWhirter be forever enjoined and debarred from asserting any claim whatever in or to said mining claim, and premises adverse to the hereinbefore named owners, thereof, and for such other and further relief as to this Honorable Court shall seem meet and agreeable to law and equity, and for costs of suit in this action incurred.

CRITTENDEN HAMPTON,
Attorney for Plaintiffs.

COUNTY OF TUOLUMNE, *State of California, ss:*

Crittenden Hampton being first duly sworn, deposes and
4 says: That he is the attorney of record for plaintiffs in the foregoing action and for each of them; and that all of the said plaintiffs reside out of Tuolumne County; that he is acquainted with the facts in the foregoing complaint and that he has read the f-regoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on his information and belief, and as to those matters, he believes it to be true.

CRITTENDEN HAMPTON.

(Ten cents Rev. Stamp Attached to Original.)

Subscribed and sworn to before me this 10th day of February, 1899.

F. W. STREET,
Notary Public in and for Tuolumne County, Cal.

In this action one of the defendants, Jacob Miller, having regularly been served with process, and having failed to appear and answer the complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant, Jacob Miller, in the premises, is hereby duly entered according to law.

Attest, my hand, and the seal of said Court, this 29th day of October, 1901.

[SEAL.] J. B. DOYLE, *Clerk*,
By B. E. FERGUSON,
Deputy Clerk.

5 Filed this 10th day of February, 1899.
J. B. DOYLE, *Clerk*.

Answer of the Defendants Argall.

(Title of Court and Cause.)

Come now the defendants, Harry Argall and F. L. Argall, and answering plaintiff's complaint, admit as follows, to-wit:

I.

The said defendants admit that the plaintiffs and the defendants, except R. S. McWhirter, now are and for a long time hitherto have been, the owners of, and entitled to the possession of, all that certain mining claim particularly described in paragraph one of plaintiffs' complaint.

II.

Said defendants admit that the said parties to this proceeding, except the said defendant, R. S. McWhirter, claim title to all of the property described as aforesaid.

III.

Said defendants admit that the said defendant, R. S. McWhirter, claims an estate in the aforesaid mine and mining property,
6 adverse to all of the aforesaid plaintiffs and defendants, particularly named in plaintiff's complaint.

Wherefore, the said defendants pray: That by a decree of the above entitled Court, it be adjudged and decreed that the said parties to this proceeding are the owners and entitled to the possession of the said property heretofore named and described.

That the said defendant, R. S. McWhirter, be enjoined and debarred from asserting any claim whatever in and to the said mining claim and premises, adverse to other parties to this proceeding, and for such other and further relief as to this Court may seem meet and agreeable to law and equity, and for their cost of suit.

WILL M. BEGGS,
Attorney for the said Defendants, F. L. and Harry Argall.

F. P. OTIS,
Of Counsel.

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

F. L. Argall, being duly sworn, deposes and says: That he is one of the defendants named in the above entitled action; that he has heard read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to
7 matters stated therein on his information or belief and as to those matters that he believes it to be true.

F. L. ARGALL.

Subscribed and sworn to before me this 24th day of February, 1899.

[SEAL.] WILL M. BEGGS,
Notary Public in and for the County of Santa Clara, State of California.

Filed February 27, A. D. 1899.

J. B. DOYLE, *Clerk,*
By A. C. ORTEGA,
Deputy Clerk.

Summons.

[Title of Court and Cause.]

The People of the State of California send greeting to R. S. McWhirter, Jacob Miller, Harry Argall, defendants.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the said County of Tuolumne, State of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.
8 And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the County of Tuolumne, State of California, this 10th day of February, A. D. 1899.

[SEAL.] J. B. DOYLE, *Clerk.*

Filed February 23, A. D. 1899.

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

L. E. Mecartea being duly sworn, deposes and says: That he is, and was at the time of service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within summons on the 20th day of February, A. D. 1899, on Harry

Argall and R. S. McWhirter, defendants therein named, by delivering to each of said defendants personally in the said County of Tuolumne, a copy of said summons and upon defendants and each of them personally, in the aforesaid County of Tuolumne, a
9 copy of said summons and each of them attached to a true copy of the complaint named and filed in the action therein mentioned.

L. E. MECARTEA.

Subscribed and sworn to before me, this 21st day of February, A. D. 1899.

L. MURROW,
Notary Public.

Filed February 23, 1899.

J. B. DOYLE, *Clerk.*
By A. C. ORTEGA,
Deputy Clerk.

CRITTENDEN HAMPTON,
Attorney for the Plaintiffs.

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

H. F. Dusing being duly sworn, deposes and says: That he is, and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within summons on the 14th day of February, A. D. 1899, on F. L. Argall and Jacob Miller, defendants therein named, by delivering to each of the said defendants personally in the City of
10 San Jose, County of Santa Clara, a copy of said summons, and each of them attached to a true copy of the complaint filed in the action therein mentioned.

H. F. DUSING.

Subscribed and sworn to before me, this 14th day of February, A. D. 1899.

[SEAL.] W. E. CROSSMAN,
Notary Public in and for the County of Santa Clara, State of California.

Amended Answer of R. S. McWhirter.

[Title of Court and Cause.]

Now comes the defendant, R. S. McWhirter and having obtained permission of the Court so to do, files this, his amended answer to plaintiffs' complaint, and denies:

I.

That E. L. Emerson, or Mrs. A. L. Emerson, or F. F. Britton, or Jacob Miller or Harry Argall, or F. L. Argall, plaintiffs and de-

fendants above named other than this defendant, or either of them are now, or for a long time hitherto have been, or ever were, the owners of, and entitled to the possession of, all or any part of that certain mining claim described in plaintiffs' complaint herein, or at all.

11

II.

This defendant avers that he has no information or belief sufficient to enable him to answer paragraph two of plaintiff's complaint, and therefore and on that ground, he denies that the consent of the alleged co-owners or defendants, Jacob Miller or Harry Argall, or F. L. Argall, or either of them, could not be obtained to join in this complaint herein, as plaintiffs, or that they or either of them, are made defendants herein that justice may be done in the premises, or at all.

III.

This defendant avers, that he has no information or belief upon the subject sufficient to enable him to answer paragraph three of plaintiff's complaint; and therefore and on that ground, this defendant denies that the said defendants, Jacob Miller, Harry Argall or F. L. Argall or the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson or F. F. Britton, or either of them, claim the title to all or any part of the alleged Slap Jack mine or mining property in said complaint mentioned, or at all.

IV.

The defendant admits that he claims an interest in the aforesaid mine and mining property mentioned in plaintiff's complaint adverse to all of the plaintiffs in this action, and to all of the defendants in this action except himself.

12

V.

That if plaintiffs or defendants herein other than this defendant McWhirter, ever had any right or title to the ground or mining claim described in their said complaint, they lost and forfeited all such right and title long before the commencement of this action by failing to perform the work required to be done upon said claim for the year 1898, and that by reason of such failure the said plaintiffs have lost and forfeited all their alleged rights to said claim in said Complaint and in this Answer mentioned.

VI.

That on the 1st day of January 1899, the lands and premises in the Complaint described, were public mineral lands of the United States, and were open to location and purchase by citizens of the United States, and on said 1st day of January, 1899, the said defendant, R. S. McWhirter, he being a citizen of the United States, entered in and upon said lands and premises, and located the same by posting thereon his Preliminary Notice of Location, as by law required, and at said time marked the surface of said claim so that its boundaries could be readily traced, that within sixty (60) days

thereafter, said defendant caused fifty dollars' worth of labor to be performed upon said claim in the development of his discov-
13 ery thereon, and within said sixty (60) days, he caused to be filed in the office of the County Recorder of the County of Tuolumne, his certificate of location of said mining claim and premises, which said certificate contained the name of the lode or claim, the name of the locator, the date of the discovery and posting thereon of the said preliminary notice of location above mentioned, a description of the claim, defining the exterior boundaries as they are marked upon the ground and a reference to a natural object and permanent monument, sufficient to identify the claim, also the statement that such certificate is the final or completed notice of location and that defendant had performed fifty dollars' worth of labor in development work upon said claim. Said certificate being dated and signed by defendant and verified by him in the manner required by law.

VII.

That this defendant now is and ever since the 1st day of January, 1899, has been the owner of and in the possession of that certain mining claim located by him as aforesaid, as the Jim Blaine quartz mine, being the same lands and premises in the complaint described and referred to in plaintiff's complaint, and by the plaintiffs called Slap Jack mine.

Wherefore, this defendant prays:

14 1st. That the plaintiffs take nothing by their action.

2nd. That this Court by its decree, declare and adjudge this defendant to be the owner of the said premises described herein, and that his title thereto be declared good and valid.

3rd. And for such other and further relief as to this Court may seem meet, and for his costs in this action incurred.

F. W. STREET AND
W. C. KENNEDY,
Attorneys for Defendant, R. S. McWhirter.

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

R. S. McWhirter, being duly sworn, deposes and says: That he is the defendant named in the above entitled action, that he has heard read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters stated on information or belief and as to those matters, that he believes it to be true.

R. S. M'WHIRTER.

Subscribed and sworn to before —, this 10th day of April, 1899.

[SEAL.] F. W. STREET,
Notary Public in and for Tuolumne County, California.

15 Filed April 10, 1899.

J. B. DOYLE, *Clerk,*
By A. C. ORTEGA,
Deputy Clerk.

Service of the within amended answer hereby admitted this 10th day of April, 1899.

WILL M. BEGGS,
Attorney for Defendants Argall and Argall.

Service of the within amended answer is hereby admitted this 10th day of April, A. D. 1899.

CRITTENDEN HAMPTON,
Attorney for Plaintiffs.

Order Substituting Defendant, Yosemite Gold Mining and Milling Company, for Defendant, R. S. McWhirter and Order Permitting Plaintiffs to File Supplemental Complaint.

[Title of Court and Cause.]

JANUARY 31, 1902.

In the above entitled action J. P. O'Brien, Esq., appeared for the plaintiffs and F. W. Street, Esq., appeared for the defendants; by consent, Yosemite Gold Mining and Milling Company substituted for R. S. McWhirter, *et als.;* by consent plaintiffs allowed to file supplemental complaint; trial of above entitled cause continued to February 17, 1902, at 10 o'clock a. m.

J. B. DOYLE, *Clerk.*

16 *Supplemental Complaint.*

[Title of Court and Cause.]

Now come the plaintiffs in the above entitled action, and, by leave of the Court first had and obtained, file this their supplemental Complaint herein, and for cause of action allege and show to the Court as follows:

I.

That the Plaintiffs are informed and believe and thereupon allege, that the Defendant, Yosemite Gold Mining and Milling Company, is, and for about two years last past has been, a Corporation organized and existing under and by virtue of the laws of the State of South Dakota, and engaged in the business of mining in the County of Tuolumne, State of California.

II.

"That at all the time- herein mentioned, the Plaintiff, E. L. Emerson, and the Plaintiff, Mrs. A. L. Emerson, were, and now are, husband and wife.

III.

That at the time of the filing of the Complaint in this action, and at the time of the former trial thereof, the Plaintiffs herein
17 and the Defendants, Harry Argall and F. L. Argall, were the owners of all that certain Quartz Mine and Mining Property

situated at Second Garotte, about two miles easterly from the town of Groveland, in the County of Tuolumne, State of California, and known as and called the "Slap Jack Mining Claim," being 1500 feet in length along the vein and 600 feet in width.

IV.

That since the filing of said complaint, and since the former trial of this action, the Plaintiff, E. L. Emerson, has granted and conveyed to the plaintiff, F. F. Britton, all his right, title and interest of, in and to said mine and mining property, and the said F. F. Britton is now the owner and holder thereof; that since the filing of said complaint, and since the former trial of this action, the defendants, Harry Argall and F. L. Argall, have forfeited and lost all of their, and each of their, right, title and interest of, in and to said mine and mining property by reason of their failure to contribute and pay to the plaintiffs herein, who were their co-owners in said mine and mining property, their proportion of the annual labor and expenditures required by law to be performed upon said mine for the year 1898, and which said labor was performed and said
18 expenditures were made by the plaintiffs herein, although the plaintiffs herein did, at the expiration of said year 1898, and to-wit, on or about the 20th day of December, 1899, give said defendants, Harry Argall and F. L. Argall, and each of them, personal notice, in writing, requiring them, and each of them, to contribute and pay to their said co-owners, E. L. Emerson, F. F. Britton, Jacob Miller and Mrs. A. L. Emerson, within the time required by law, their proportion of the expenditures made by their said co-owners upon said mine during the year 1898, as aforesaid, and notifying them, and each of them, that if they, or either of them, failed or refused, within the time required by law, to contribute and pay to their said co-owners, the plaintiffs herein, their or either of their portion of such expenditures, that then, and in that event, their interest in the said Slap Jack Mining Claim, or the interest of the one so failing or refusing to contribute and pay his portion of such expenditures, would be forfeited to their said co-owners who performed said work, and that their interest in said claim, or the interest of the one so failing or refusing to contribute and pay his portion of such expenditures, would thereupon belong to and become the property of their said co-owners, who had made the required expenditures; that said defendants, Harry Argall and F. L.
19 Argall, and each of them, failed to contribute or pay, and they did not contribute or pay to the plaintiffs herein, within the time required by law, or at all, their portion of the annual labor and expenditures performed and made by the plaintiffs upon said mine and mining claim during the year 1898, and that by reason thereof, and of the Statute in such cases made and provided, the said Harry Argall and F. L. Argall forfeited to the plaintiffs herein all of their, and each of their, right, title and interest of, in and to said mine and mining claim, and the interest of said defendants, Harry Argall and F. L. Argall, and each of them, thereupon became, and ever since has been, and now is, the property of the plaintiff herein;

that thereafter the defendants, Harry Argall and F. L. Argall, executed and delivered to the Yosemite Gold Mining Company, a corporation, a deed, wherein and whereby they attempted to grant and convey to said Yosemite Gold Mining Company all of the undivided nine-twentieths interest of, in and to said mine and mining claim formerly owned by them, and thereafter the said Yosemite Gold Mining Company executed and delivered to the defendant, Yosemite Gold Mining and Milling Company, a corporation, a deed, wherein and whereby it attempted to grant and convey to said defendant, Yosemite Gold Mining and Milling Company, the said un-
20 divided nine-twentieths interest formerly owned by said defendants, Harry Argall and F. L. Argall, of, in and to said mine and mining claim; but that said deeds were, and each of them was executed and delivered after the defendants, Harry Argall and F. L. Argall, and each of them, had forfeited all of their right, title and interest of, in and to said mine and mining claim by reason of their failure to contribute and pay their portion of the annual labor and expenditures performed thereon by the plaintiff herein during the year 1898, as required by law; and that said deeds were, and each of them was received and accepted by said Yosemite Gold Mining Company, and also by the defendant, Yosemite Gold Mining and Milling Company, and by each of them, with full notice and knowledge that said defendants, Harry Argall and F. L. Argall, had failed to contribute and pay their portion of the annual labor and expenditures performed upon said mine and mining claim by the plaintiffs herein during the year 1898, as required by law, and said deeds were, and each of them was, received and accepted by each of said companies with full notice and knowledge that said Harry Argall and F. L. Argall, and each of them, had forfeited to their co-owners, the plaintiffs herein, all of their, and each of their right, title and interest of, in and to said mine and mining claim, as aforesaid.

21 V.

That the plaintiffs, Mrs. A. L. Emerson, F. F. Britton and Jacob Miller, are the owners of, and are entitled to the possession of, all the mine and mining property hereinabove described.

VI.

That at the time of the filing of the complaint in this action, and at the time of the former trial thereof, the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, could not obtain the consent of their co-owner, Jacob Miller, to join with them as a plaintiff in prosecuting said action, and for that reason said Jacob Miller was made defendant therein; but, that since said time, said Jacob Miller has consented, and he now consents, to join with said plaintiffs in the prosecution of this action, and he is, therefore, joined with them as a plaintiff herein.

VII.

That the defendant, Yosemite Gold Mining and Milling Company, claims to have some interest and estate of, in and to said mine and mining property, adverse to the plaintiffs.

VIII.

That the claim of said defendant, Yosemite Gold Mining
22 and Milling Company, of, in and to said mine and mining property is without any right whatsoever, and the said defendant has not any estate, right, title, interest or claim whatsoever of, in or to said mine and mining property, or any part thereof.

Wherefore, the plaintiffs pray:

1. That the Yosemite Gold Mining and Milling Company be required to set forth the nature of its claim of, in and to said mine and mining property, and that all adverse claims of said defendant be determined by a decree of this Court.

2. That by said decree it be declared and adjudged that the Yosemite Gold Mining and Milling Company has not any estate, right, title, interest or claim whatever in or to said mine and mining property, and that the title thereto of the plaintiffs, Mrs. A. L. Emerson, F. F. Britton and Jacob Miller, is good and valid.

3. That the defendant, Yosemite Gold Mining and Milling Company, be forever enjoined and restrained from asserting any claim whatever of, in or to said mine and mining property, or any part thereof, adverse to the plaintiffs.

4. For such other and further relief as the premises being considered shall to this Honorable Court seem meet and proper.

23 5. For costs of suit.

J. P. O'BRIEN AND
CRITTENDEN HAMPTON,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

Crittenden Hampton, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiffs in the above entitled action; that he has read the above and foregoing Supplemental Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

Affiant further deposes and says that he verifies the above and foregoing Supplemental Complaint for and on behalf of the plaintiffs, and at their request, for the reason that all of said plaintiffs are absent from the County of Tuolumne, the County where their attorneys reside, and for the further reason that all of the facts alleged in said Supplemental Complaint are within the knowledge of affiant.

CRITTENDEN HAMPTON.

Subscribed and sworn to before me, this third day of February, A. D. 1902.

J. P. O'BRIEN,
24 *Notary Public in and for the County of*
[SEAL.] *Tuolumne, State of California.*

Service of the within admitted by copy this 3d day of February, 1902.

W. C. KENNEDY,
F. W. STREET,
Attorneys for Defendants.

Filed February 4th, 1902.

J. B. DOYLE, *Clerk*,
By B. E. FERGUSON,
Deputy Clerk.

Answer to Supplemental Complaint.

Comes now the defendant, Yosemite Gold Mining and Milling Company, and for its answer to plaintiff's Supplemental Complaint, admits, avers and denies as follows:

Admits that the defendant, Yosemite Gold Mining and Milling Company, is and was during the time in the Supplemental Complaint mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of South Dakota, and engaged in the business of mining in the County of Tuolumne, State of California.

Denies that, either at the time of filing the Complaint in
25 this action, or at the former trial thereof, or at any time the plaintiffs herein and the defendants Harry Argall and F. L. Argall or either of them were the owners of all or any portion of the "SLAP JACK MINING CLAIM" in paragraph III of plaintiff's Supplemental Complaint described.

Denies, upon its information and belief, that the plaintiff E. L. Emerson has, at any time or at all, either granted and conveyed, or granted or conveyed to the plaintiff F. F. Britton either his right, or title or interest in and to the mine and mining property in the Supplemental Complaint described or any right, title or interest in or to said mine and mining property whatever, and denies that the said F. F. Britton is now or that he ever was the owner and holder, or owner or holder of said mine and

Denies, that the plaintiffs, Mrs. A. L. Emerson, F. F. Britton and Jacob Miller, or either or any of them, are the owners of or entitled to the possession of all or any portion of the mine or mining property in the Supplemental Complaint described.

The defendant avers, that it has no information or belief sufficient to enable it to answer paragraph six of plaintiffs Supplemental Complaint, and therefore and on that ground, it denies that either at the time of filing the Complaint in this action or at the time of
26 the former trial thereof, the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton or either of them, could not obtain the consent of said Jacob Miller to join with them as a plaintiff in prosecuting said action; denies that the said plaintiffs ever were or now are the owner of the mining claim in the Supplemental Complaint described, or that said Jacob Miller ever was or is now a co-owner with said plaintiffs or an owner of the said mining claim;

denies that said Jacob Miller has ever consented or that he does now consent to join with said plaintiffs in the prosecution of this action.

The defendant admits that it claims an interest and estate of, in and to the said mine and mining property adverse to plaintiffs.

The defendant avers, that if plaintiffs or their grantors, or either of them ever had any right or title to the mining ground or mining claim in their Supplemental Complaint described, they and each of them lost and forfeited such right and title long prior to the filing of the original complaint in this action by failing to perform the labor or make the improvements upon said mining claim for and during the year 1898, as required by Section 2324 of the Revised Statutes of the United States, and by the local rules and regulations of the Tuolumne mining district.

The defendant avers, that on the 1st day of January, 1899,
27 the lands and premises in the Supplemenal Complaint described, were public mineral lands of the United States, and were open to location and purchase by citizens of the United States, and on said 1st day of January, 1899, R. S. McWhirter, he being a citizen of the United States, entered in and upon said lands and premises, and located the same as the JIM BLAINE Quartz Mine, by posting thereon his Preliminary Notice of Location, as by law required, and at said time marked the surface of said claim so that its boundaries could be readily traced, that within sixty (60) days thereafter, said R. S. McWhirter caused fifty dollars worth of labor to be performed upon said claim in the development of his discovery therein, and within said sixty (60) days, he caused to be filed in the office of the County Recorder of the County of Tuolumne, his Certificate of Location of said mining claim and premises, which said Certificate contained the name of the lode or claim, the name of the locator, the date of discovery and posting thereon the said Preliminary Notice of Location above mentioned, a description of the claim defining the exterior boundaries as they are and were by him marked upon the ground and a reference to a natural object and permanent monument, sufficient to identify the claim, also the statement that such Certificate is the final or completed Notice of Location
28 and that he, R. S. McWhirter, had performed fifty dollars worth of labor in development work upon said claim. Said Certificate being dated and signed by said R. S. McWhirter and verified by him in the manner required by law.

The defendant avers, that by mesne grants and conveyances it has succeeded to the title of said R. S. McWhirter, of in and to the said JIM BLAINE Quartz Mine, and this defendant now is, and it and its grantors ever since the 1st day of January, 1899, have been the owners of and entitled to the possession of the said JIM BLAINE Quartz Mine, being the same lands and premises in the Supplemental Complaint described, and referred to therein and by the plaintiffs called the "Slap Jack Mining Claim." Defendant denies that its claim of, in and to the said JIM BLAINE Quartz Mine is without right, and denies that it has not any estate, right, title or interest therein and thereto.

And now comes the defendant, Yosemite Gold Mining and Milling Company (not waiving its defense to said action as hereinbefore set forth in this its answer to plaintiff's Supplemental Complaint) and for a further and separate answer to plaintiff's Supplemental Complaint, admits, avers and denies as follows:

That this defendant, Yosemite Gold Mining and Milling Company is now, and for more than two years last past has been
29 a corporation duly organized and existing under and by virtue of the laws of the State of South Dakota, and engaged in the business of mining in the County of Tuolumne, State of California.

Denies that since the filing of the original complaint in this action, the defendants, Harry Argall and F. L. Argall, or either of them have forfeited and lost, or forfeited or lost, their or either of their right, title or interest of, in or to said mine or mining property in said Supplemental Complaint described by reason of their or either of their failure to contribute and pay, or contribute or pay to said plaintiffs, co-owners with them in said mine and mining property, their proportion of the labor and expenditures made by said plaintiffs upon said mine or mining property for the year 1898, as and for the annual labor and expenditure required by law to be performed upon said mine for said year, 1898. Denies that plaintiff did, either on the 20th day of December, 1899, or at any time, give said defendants, Harry Argall and F. L. Argall or either of them personal notice, either in writing or otherwise, requiring them or either of them to either contribute or pay to their said co-owners, E. L. Emerson, F. F. Britton, Jacob Miller and Mrs. A. L. Emerson, within any time whatever, their or either of their proportion of the expenditure made by their said co-owners upon said mine in
30 the Supplemental Complaint described during the year 1898; denies that said plaintiffs in any manner notified said defendants, Harry Argall and F. L. Argall, or either of them, that if they or either of them failed or refused to contribute and pay, or contribute or pay to said plaintiffs, their or either of their proportion of such expenditures, that then and in that event, their or either of their interest in said Slap Jack Mining Claim would be forfeited to said plaintiffs, or that their or either of their interest in and to said Slap Jack Mining Claim would belong and become the property of plaintiffs. Denies that said defendants, Harry Argall and F. L. Argall or either of them did fail to contribute or pay to said plaintiffs their portion of the annual labor or expenditures performed or made by plaintiffs upon said Slap Jack Mining Claim during the year 1898, and denies that by reason of any act or acts or omission of said defendants, Harry Argall and F. L. Argall, or either of them, they or either of them forfeited to the plaintiffs their or each of their right, title and interest of, in and to the said Slap Jack Mining Claim. Denies that the interest of said defendants, Harry Argall and F. L. Argall, or of either of them of, in and to said Slap Jack Mining Claim ever became or now is the property of said plaintiffs.

31 Defendant avers, that on the 31st day of May, 1899, the said Harry Argall and F. L. Argall were the owners of and

entitled to the possession of an undivided nine-twentieths of the mining claim and mining property in the Supplemental Complaint described, and the defendant admits, that on the 31st day of May, 1899, the said defendants Harry Argall and F. L. Argall, duly executed and delivered to the Yosemite Gold Mining Company, a corporation, a deed wherein and whereby they conveyed to said Yosemite Gold Mining Company all of the undivided nine-twentieths interest of, in and to said Slap Jack Mining Claim, and that, thereafter, the said Yosemite Gold Mining Company duly executed and delivered to this defendant, a deed wherein and whereby it did convey to this defendant the said undivided nine-twentieths interest in and to said Slap Jack Mining Claim owned by said defendants, Harry Argall and F. L. Argall, prior to their deed to the said Yosemite Gold Mining Company as aforesaid. Denies that said deeds were or either of them was, executed or delivered after the defendants, Harry Argall and F. L. Argall had forfeited their right, title or interest of, in or to said Slap Jack Mining Claim to plaintiffs, and denies that said defendants, Harry Argall and F. L. Argall, or either of them, ever at any time, either by any act or omission of theirs, or of either of them whatever, forfeited to plaintiffs
32 their right, title and interest in and to said Slap Jack Mining Claim. Denies that said deeds or either of them were received and accepted by said Yosemite Gold Mining Company and by this defendant, or by either of them, with any notice or knowledge whatever that said defendants, Harry Argall and F. L. Argall, or either of them had failed to contribute and pay their portion of the annual labor and expenditure performed upon said Slap Jack Mining Claim by the plaintiffs during the year 1898, as required by law or otherwise. Denies that said or either of said deeds were received and accepted by said companies or either of them with any notice or knowledge whatever that said Harry Argall and F. L. Argall, or either of them, had forfeited to the said plaintiffs their and each of their right, title and interest of, in and to said Slap Jack Mining Claim.

Wherefore, the defendant, Yosemite Gold Mining and Milling Company prays:

1. That it be adjudged and decreed by this Court that the Yosemite Gold Mining and Milling Company is the owner of and entitled to the possession of the mining claim in the Supplemental Complaint described and now known as the JIM BLAINE QUARTZ CLAIM.

2. That the plaintiffs be forever enjoined and restrained from asserting any claim whatever of, in and to said Mining Claim
33 and Mining Property, or any portion thereof, adverse to the defendant, Yosemite Gold Mining and Milling Company.

3. That, in the event this Court should declare and adjudge the location made by R. S. McWhirter herein referred to, void and invalid, that the Court then declare and adjudge that the defendant, Yosemite Gold Mining and Milling Company, is the owner of and entitled to the possession of an undivided nine-twentieths (9-20)

of the mining claim and mining property in the Supplemental Complaint described.

4. For such other and further relief as to this Court shall seem meet and agreeable to equity in the premises.

5. For costs in this action.

W. C. KENNEDY AND
F. W. STREET,
Attorneys for the Defendant, Yosemite Gold Mining and Milling Company.

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

W. M. Smith, being first duly sworn deposes and says: That he is the Secretary of the Yosemite Gold Mining and Milling Company, that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to those
34 matters that are therein stated on his information or belief, and as to those matters that he believes to be true.

W. M. SMITH.

Subscribed and sworn to before me, this 8th day of February, 1902.

[SEAL.] W. W. GRAY,
Notary Public in and for the County of Santa Clara, State of California.

Service of the within answer is hereby admitted this 11th day of February, A. D. 1902.

J. P. O'BRIEN AND
CRITTENDEN HAMPTON,
Attorneys for Plaintiffs.

Filed February 11th, 1902.

J. B. DOYLE, *Clerk.*

[Title of Court and Cause.]

Findings.

The above entitled action came on regularly for trial on the 17th day of February, 1902, before the Court sitting without a jury, a trial by jury having been duly waived, Hon. G. W. Nicol, Judge presiding. Mr. J. P. O'Brien and Mr. Crittenden Hampton appeared as counsel for the plaintiffs, and Mr. F. W. Street,
35 Mr. W. C. Kennedy and Mr. Will M. Beggs appeared as counsel for defendants. And the Court having heard the proofs of the parties, and said cause having been submitted to the Court for its decision, and the Court having fully considered the same, and the records and papers on file therein now finds the following:

Facts.

1. That at all the times mentioned in the supplemental complaint herein, the defendant, Yosemite Gold Mining and Milling Company, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of South Dakota, and engaged in the business of mining in the County of Tuolumne, State of California.

2. That at all the times herein mentioned, the plaintiff, E. L. Emerson and Mrs. Annie L. Emerson were, and now are husband and wife.

3. That on the first day of January, 1896, the land and premises in controversy, and which are hereinafter more particularly described, were vacant public mineral lands of the United States, and were open to location and purchase by citizens of the United States, and by those who had declared their intention to become citizens.

4. That on the first day of January, 1896, Walter J. Coyle, discovered a valuable vein or lode quartz, bearing gold, within
36 the limits of said lands and premises, and thereupon, on said day, he located and appropriated the same as and for a quartz mining claim, and posted thereon his notice of location at the east end of the lode line, and marked said claim on the ground so that the boundaries thereof could be readily traced, and thereafter, and on the 13th day of January, 1896, he recorded a copy of the notice of location posted by him on said claim, as aforesaid, in the office of the Mining Recorder of the Tuolumne Mining District, County of Tuolumne, State of California, and the same was thereupon, and on said day, recorded in Volume 7 of Quartz Claims, at page 114 of the Mining Records of said Mining District; that the claim so located by said Walter J. Coyle was 1500 feet in length along the vein and 600 feet in width, and was called the "SLAP JACK MINING CLAIM;" that the notice of location so posted and recorded by said Walter J. Coyle, as aforesaid, contained, among other things, the name of the locator, the day of the location, the name of the claim or lode located, the length claimed along the vein, to-wit: 1500 feet, and the width claimed on each side of the center of said vein, to-wit: 300 feet, and a description of said claim by reference to natural objects and permanent monuments such as would identify the claim; that
37 said Walter J. Coyle is a native born citizen of the United States, and at the times herein mentioned was, and now is, over the age of twenty-one years.

5. That on the 6th day of August, 1896, the said Walter J. Coyle executed and delivered to Harry Argall, F. L. Argall, Benson Griswold and F. L. Emerson, his deed, wherein and whereby he granted and conveyed to them all of said "SLAP JACK MINING CLAIM," located by him as aforesaid, which said deed was thereafter, and on the 7th day of August, 1896, recorded in the office of the County Recorder of said County of Tuolumne, in Vol. 31 of Deeds, at page 275 of the records of said County; thereafter, and on the 2nd day of January, 1897, F. L. Argall and Harry Argall executed and delivered to Jacob Miller their deed, wherein and whereby they granted

and conveyed to said Jacob Miller an undivided 1-20 interest of, in and to said Mine and Mining Property, and which said deed was thereafter, on the 11th day of January, 1897, recorded in the office of said County Recorder, in Vol. 32 of Deeds, at page 185 of the records of said County; thereafter, and on the 24th day of February, 1898, Benson Griswold executed and delivered to the plaintiffs, F. F. Britton, his deed wherein and whereby he granted and conveyed to said F. F. Britton an undivided 1-6 interest of, in and to said Mine and Mining Property, and which said deed was thereafter,
38 and on the 4th day of March, 1898, recorded in the office of said County Recorder, in Vol. 35 of Deeds, at page 386 of the records of said County; thereafter, on the 28th day of September, 1898, said Benson Griswold executed and delivered to William W. Gray his deed, wherein and whereby he granted and conveyed to him an undivided 1-12 interest of, in and to said Mine and Mining Property, and which said deed was thereafter, and on the 3rd day of October, 1898, recorded in the office of the said County Recorder in Vol. 38 of Deeds, at page 422 of the records of said County; thereafter, and on the 19th day of September, 1898, F. L. Emerson executed and delivered to the plaintiff, Mrs. Annie L. Emerson, his deed wherein and whereby he granted and conveyed to her an undivided 1-4 interest of, in and to said Mine and Mining Property, and which deed was thereafter, and on the 22nd day of September, 1898, was recorded in the office of said County Recorder in Vol. 38 of Deeds, at page 386 of the records of said County; thereafter, and on the 12th day of November, 1898, said William W. Gray executed and delivered to E. L. Emerson his deed, wherein and whereby he granted and conveyed to him an undivided 1-12 interest of, in and to said Mine and Mining Property, and which deed was thereafter,
39 and on the 16th day of November, 1898, recorded in the said office of the said County Recorder in Vol. 38 of Deeds, at page 562 of the records of said County; thereafter, and on the 31st day of May, 1899, Harry Argall and F. L. Argall executed and delivered to the Yosemite Gold Mining Company, their deed wherein they granted to the said Yosemite Gold Mining Company all of their right, title and interest of, in and to said Mine and Mining Property, to-wit: an undivided 9-20 interest therein, and which said deed was thereafter, and on the 12th day of January, 1900, recorded in the office of the said County Recorder, in Vol. 43 of Deeds, at page 182 of the records of said County; thereafter, and on the 2nd day of May, 1900, the said E. L. Emerson executed and delivered to the plaintiff, F. F. Britton, his deed, wherein and whereby he granted and conveyed to him all his right, title and interest of, in and to said Mine and Mining Property, and which deed was thereafter, and on the 20th day of January, 1902, recorded in the office of said County Recorder, in Vol. 49 of Deeds, at page 72 of the records of said County; thereafter, and on the 30th day of May, 1900, said Yosemite Gold Mining Company executed and delivered to the Yosemite Gold Mining and Milling Company, one of the defendants herein, its deed, wherein and whereby it granted and con-

veyed to said Yosemite Gold Mining and Milling Company, all of its right, title and interest of, in and to said Mine and Mining
40 Property, and which deed was thereafter, and on the 28th day of September, 1900, recorded in the office of said County Recorder, in Vol. 44 of Deeds, at page 302, of the records of said County.

6. That during the year 1898, the plaintiffs performed $84.80 worth of labor upon said Mine and Mining Claim; that on the 31st day of December, 1898, the plaintiffs resumed work upon said Mine and Mining Claim, and prosecuted said work diligently thereafter until more than $100.00 worth of labor and improvements were performed and made thereon, in addition to the labor performed during the year 1898, as aforesaid.

7. That the defendants, Harry Argall and F. L. Argall failed to perform any labor upon said Mine and Mining Claim during the year 1898, or for the year 1898, and failed to contribute or pay to plaintiffs who were their co-owners therein, their proportion of the expenditures made by said plaintiffs upon said claim for the year 1898, as aforesaid, but it was agreed, however, between the plaintiffs and the defendants, F. L. Argall, that the defendants, Harry Argall and F. L. Argall, would not be required to pay any part of the costs or expenses incurred by the plaintiffs in taking the water out of said mine during the year 1898, but that such cost should offset the costs incurred by the defendants, Harry Argall and F. L. Argall, in taking water out of said mine during the year 1897.

41 8. That after the expiration of the year 1898, and on or about the 20th day of December, 1899, the plaintiffs gave said defendants, Harry Argall and F. L. Argall, and each of them, personal notice, in writing, requiring them and each of them, to contribute and pay to the plaintiffs herein, within the time required by law their proportion of the annual labor and expenditures performed and made by said plaintiffs upon said mine for the year 1898, as aforesaid, and notifying them, and each of them, that if they, or either of them failed or refused, within the time required by law, to contribute and pay to plaintiffs their, or either of their proportion of such labor and expenditures, that then, and in that event, their interest in the said "SLAP JACK MINING CLAIM" or the interest of the one so failing or refusing to contribute to pay his proportion of such labor and expenditures, would be forfeited to his said co-owners who had performed said work, and that their interest in said claim, or the interest of the one so failing or refusing to contribute and pay his proportion of such labor and expenditures, would thereupon belong to and become the property of their co-owners, the plaintiffs herein, who had made the required expenditures; that said defendants, Harry Argall and F. L. Argall, and each of them,
42 thereafter failed to contribute or pay, and they did not contribute or pay, to the plaintiffs their proportion of the annual labor and expenditures performed and made by the plaintiffs upon said mine and mining claim for the year 1898; that said notice requiring said defendants, Harry Argall and F. L. Argall, to con-

tribute and pay to the plaintiffs their proportion of said annual labor and expenditures was served upon said Harry Argall and F. L. Argall and upon each of them, after they had executed and delivered to the Yosemite Gold Mining Company their deed wherein and whereby they granted and conveyed to said Yosemite Gold Mining Company all of their interest in said "Slap Jack Mining Claim."

9. That the plaintiffs, Mrs. Annie L. Emerson, F. F. Britton and Jacob Miller, and their Grantors, have worked and operated said mine and mining claim in good faith, and without any intention of abandoning the same.

10. That on the 1st day of January, 1899, R. S. McWhirter, the grantor and predecessor in interest of the defendant, Yosemite Gold Mining and Milling Company, attempted to locate the ground included within the limits of the "Slap Jack Mining Claim" located by said Walter J. Coyle, as aforesaid, by posting thereon his preliminary notice of location, and by setting sufficient stakes to mark the boundaries of said claim, and by recording a copy of said
43 preliminary notice of location in the office of the County Recorder of said County of Tuolumne, and also by causing $50 worth of labor to be performed upon said claim in the development of his alleged discovery thereon, and by filing in the office of the County Recorder of said County of Tuolumne, the certificate of final location of said mining claim, containing the name of the claim or lode located, to-wit, the "Jim Blaine Quartz Mining Claim," the name of the locator, to-wit, R. S. McWhirter, the date of discovery and posting thereon of the alleged preliminary notice of location, to-wit, January 1st, 1899, and a description of said claim defining the exterior boundaries thereof as they were marked upon the ground; that thereafter, the said R. S. McWhirter granted and conveyed to the defendant, Yosemite Gold Mining and Milling Company, by means of conveyances, all of the premises and property attempted to be located by him on the 1st day of January, 1899, under the name of the "Jim Blaine Quartz Mining Claim," as aforesaid.

11. That at the time of the attempted location of said ground by the said R. S. McWhirter, the lands and premises sought to be located by him were not vacant public mineral lands of the United States, and were not open to location or purchase by the said R. S. McWhirter, or by any other person, but that said lands, were, at that time, the property of the plaintiffs and of the defendants,
44 Harry Argall and F. L. Argall and were included within the "Slap Jack Mining Claim" and the said "Slap Jack Mining Claim" was, at that time and at all the times herein mentioned since the first day of January, 1896, has been, and now is a valid and subsisting mining claim.

12. That on or about the 6th day of November, 1899, an action was commenced in this court, wherein H. A. Blanchard was the plaintiff, and Harry Argall, F. L. Argall, B. Griswald, F. L. Emerson and the plaintiffs herein were the defendant-. That said action was brought to foreclose a mortgage executed and delivered to Joseph Marsden by said Harry Argall and F. L. Argall, B. Griswold and F. L. Emerson upon the premises and property herein described, be-

sides other properties, which said mortgage, was, before the commencement of said action, assigned to H. A. Blanchard, the plaintiff therein; that thereafter, and on the 23rd day of February, 1900, said action was regularly tried in this Court, and upon that day judgment and decree of this Court was duly made, given and rendered therein; that it was adjudged and determined in and by said judgment and decree that Harry Argall and F. L. Argall, B. Griswold and F. L. Emerson, a portion of the defendants in said action, were indebted to H. A. Blanchard, the plaintiff therein, in the sum
45 of $2,076.10, and that said sum was declared and adjudged to be a lien upon the lands and premises herein described and referred to; it was also adjudged and determined, in and by said judgment and decree, that the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, had succeeded to the rights of said mortgagors in said property, and that said plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton were the owners of an undivided nineteen-twentieth interest in said "Slap Jack Mining Claim," subject to the lien of said mortgage; it was also ordered and adjudged, in and by said judgment and decree, that said mortgaged property be sold in the manner prescribed by law by H. A. Hardinge, who was, in and by said judgment and decree, appointed a commissioner of this Court for that purpose; thereafter, and on the first day of March, 1900, the said H. A. Hardinge qualified as such commissioner, and took the oath of office, and filed with the Clerk of this Court a bond in the sum of $1,000 as required by the judgment and decree aforesaid; thereafter on the 2nd day of March, 1900, an order of sale was issued out of this Court in said action, directed to said H. A. Hardinge, commissioner as aforesaid, commanding him to sell the premises and property described in said order of sale, and in the judgment and decree of foreclosure aforesaid in the manner provided by law, and to make and file his return of said sale with the Clerk of this Court within thirty
46 days thereafter, that thereafter, and on the 31st day of March, 1900, the said H. A. Hardinge, as such commissioner, and pursuant to the judgment and decree of foreclosure and order of sale aforesaid, sold the lands and premises described in said judgment and decree of foreclosure and order of sale, and which included, among other properties, the "Slap Jack Mining Claim" aforesaid, at public auction according to law, to Peter Berg for the sum of $2,151.57, in United States gold coin, and thereupon and on said day he delivered to said purchaser a certificate of sale of said premises and recorded a duplicate thereof in the office of the County Recorder of said County of Tuolumne; that said certificate so delivered and recorded contained a particular description of the real property sold, the price paid for each distinct parcel, the whole price paid, and stated that said real estate was sold subject to redemption from the purchaser at any time within twelve months from the date of said sale, and stated the kind of money in which said redemption should be made, and which was the same as that specified in said judgment and decree, that within twelve months from date of said sale, and to-wit, on or about the 15th day of March, 1901, the plaintiffs E. L.

Emerson, Mrs. A. L. Emerson and F. F. Britton, as the successors in interest of said judgment debtors, for the purpose of redeeming the property herein described from said sale, so made by said
47 commissioner, as aforesaid, tendered to Peter Berg, the purchaser at such sale, the amount of his purchase, with one per cent. thereon in addition, up to and including the 31st day of March, 1901, together with the amount of any and all taxes which he may have paid thereon after purchase, and interest on such amount, all in gold coin of the United States, and then and there demanded from him a certificate of redemption from said sale, and the said Peter Berg then and there refused to accept said money, or to execute or deliver to the plaintiffs E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton a certificate of redemption from said sale; that thereafter, and on or about the 15th day of March, 1901, the plaintiffs herein, as the successors in interest of said judgment debtors, for the purpose of redeeming the property herein described from said sale, tendered to H. A. Hardinge, the officer who made said sale, the amount for which said property was sold at said sale, with one per cent. per month thereon in addition to and including the 31st day of March, 1901, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and the interest on such amount, all in gold coin of the United States, and then and there demanded from such commissioner a certificate of redemption, showing that the said lands
48 and premises had been redeemed from said sale by them, but the said commissioner then and there refused to accept said moneys, and refused to permit the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton to redeem said property from the purchaser at such sale, and refused to execute or deliver to said plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, a certificate of redemption from said sale, or other evidence showing that a redemption had been made by them from said sale; that thereafter, and within twelve months from the date of said sale the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, for the purpose of redeeming said property from said sale, made by said commissioner, as aforesaid, tendered to the defendant Yosemite Gold Mining and Milling Company, a corporation, whom Peter Berg, the purchaser at such foreclosure sale, had assigned the certificate of sale issued to him by said commissioner, aforesaid, the amount paid by said Peter Berg for said property at said sale, with one per cent. per month thereon in addition, up to and including the 31st day of March, 1901, together with the amount of all taxes which said Peter Berg, or his assigns, said defendant, Yosemite Gold Mining and Milling Company, may have paid thereon after purchase, and interest on such amount, all in gold coin of the United States, and which was the same kind of money specified in said decree
49 and in said certificate, as aforesaid, and then and there demanded from said defendant, Yosemite Gold Mining and Milling Company, a certificate of redemption from said sale, but the said defendant, Yosemite Gold Mining and Milling Company, then and there refused to accept said moneys and refused to execute or

deliver to the plaintiffs E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, a certificate of redemption from said sale. That thereafter, and on the 27th day of March, 1901, the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, commenced an action in this Court, against said H. A. Hardinge, as commissioner of this Court, and also against the Yosemite Gold Mining and Milling Company, and Peter Berg, for the purpose of redeeming the lands and premises herein described and referred to from foreclosure sale thereof made by said commissioner as aforesaid. That it was alleged in the pleadings in said action, among other things, that the plaintiffs herein, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson were the owner- of an undivided nineteen-twentieths interest of, in and to said "Slap Jack Mining Claim" and which was the same interest that was described and referred to in said judgment and decree of foreclosure and order of sale, and also the same interest that was sold by said commissioner, as aforesaid, and it was also alleged in said pleadings that the plaintiffs, F. F. Britton, E. L. Emerson and
50 Mrs. A. L. Emerson, were the owners of said nineteen-twentieths interest in said "Slap Jack Mining Claim" as the successors in interest of Harry Argall, F. L. Argall and B. Griswold, and F. L. Emerson, the judgment debtors in said foreclosure action; that the right of said plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, to redeem said property from said sale was based upon the fact that they were the successors in interest of the judgment debtors in said foreclosure action; that thereafter on the 1st day of July, 1901, the defendants in said redemption suit filed their answer therein, wherein and whereby they denied, among other things, that the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, were the owners of nineteen-twentieths interest of, in and to said Slap Jack Mining Claim, or that they were the successors in interest of Harry Argall and F. L. Argall, B. Griswold and F. L. Emerson, the judgment debtors in said foreclosure action, or of either or any of them; that thereafter and on the 1st day of July, 1901, the defendants therein filed with the Clerk of this Court an offer to allow plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, to take judgment against them, permitting the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, to redeem said Slap Jack Mining Claim from the foreclosure sale
51 thereof made by said commissioner as aforesaid, upon the payment to the Clerk of this Court of the sum of $2440.00 less the costs incurred by said plaintiffs in said action, not to exceed the sum of $40.00, at the same time the said defendant notified the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, that they had deposited with the Clerk of said Court a certificate of redemption executed by H. A. Hardinge, as commissioner of said Court, and who was one of the defendants in said action, and that they had instructed said Clerk to deliver said certificate of redemption to the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, upon the payment of the moneys expressed in said offer; thereafter and on the 5th day of September, 1901, the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, filed with the

Clerk of this Court their written acceptance, wherein and whereby they accepted the offer made by the defendants in said redemption suit to allow them to take judgment for the redemption of said property from said sale as aforesaid; thereafter, on the 5th day of September, 1901, said redemption suit came on regularly for trial before this Court, and the defendants thereupon renewed in open Court the offer which they had heretofore made to allow the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, to take judg-
52 ment against them for the redemption of said porperty for said sale, and the said plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, thereupon in open Court accepted said offer, and paid the Clerk of this Court the sum of $2,400.00, being the amount expressed in said offer, and said moneys were thereupon paid by said Clerk to the Yosemite Gold Mining and Milling Company, one of the defendants in this case, and which was also one of the defendants in said action, and said Clerk thereupon delivered to the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, the certificate of redemption aforesaid; that thereafter and on the 7th day of September, 1901, judgment and decree was made, given and rendered in this Court in said redemption suit, wherein and whereby it was adjudged that the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, had, within the time required by law, fully redeemed the said "Slap Jack Mining Claim" from the foreclosure sale thereof made on the 31st day of March, 1900, by H. A. Hardinge, as commissioner appointed by this Court, under and in accordance with the decree of foreclosure made, given and entered in this Court on the 23rd day of February, 1900, in the action therein pending, wherein H. A. Blanchard was the plaintiff, and Harry Argall and F. L. Argall, B. Griswold and F. L. Em-
53 erson and the plaintiffs herein were the defendants, as aforesaid; that it was adjudged and determined by this Court in and by said judgment and decree, that the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson had redeemed said "Slap Jack Mining Claim" from the foreclosure sale thereof as the successors in interest of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, the judgment debtors in the foreclosure action aforesaid; that the "Slap Jack Mining Claim" involved in this action is the same mine and mining property that was involved in the redemption suit aforesaid, that F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson who are the plaintiffs in this case were also the plaintiffs in the redemption suit aforesaid, and the Yosemite Gold Mining and Milling Company, a corporation, who is one of the defendants in this case was also one of the defendants in said redemption suit; that the question of the ownership of 19-20 interest of, in and to said "Slap Jack Mining Claim" and the question of who were the successors of interest therein of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, was involved and was a material issue in said redemption suit, and it was adjudged and determined by this Court in and by this judgment and decree made, given and rendered in said redemption suit, that the plaintiffs, F. F. Britton, E. L.

Emerson and Mrs. A. L. Emerson, were the owners of the said
54 19-20 interest of in and to said "Slap Jack Mining Claim,"
and that they were the successors in interest of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, the judgment debtors in the foreclosure action aforesaid; that the judgmnet and decree so made, given and rendered in said redemption suit, as aforesaid, had become final, and was fully satisfied at the time of the trial of this action, to-wit, the 17th day of February, 1902.

13. That the plaintiffs, F. F. Britton, Mrs. A. L. Emerson and Jacob Miller are now owners of, and entitled to the possession of all the mine and mining property herein described and referred to, that is to say, the plaintiffs, F. F. Britton and Mrs. A. L. Emerson, are each the owners of an undivided nineteen-fortieths interest therein, and the plaintiff, Jacob Miller, is the owner of an undivided one-twentieth interest therein.

14. That the defendants are not, and each of them is not, the owner of, or entitled to the possession of any part of the lands, premises and mining property described in the pleadings herein, nor have said defendants, or either or any of them, any right, title or interest therein.

15. That the lands, premises and mining property described and referred to in the supplemental complaint herein, and called the Slap Jack Mining Claim, are the same lands, premises and
55 mining property that are described and referred to in the answer of the defendants herein, and which are called the "Jim Blaine Quartz Mining Claim."

16. That at the time of the filing of the original complaint in this action, and at the time of the former trial thereof, the plaintiffs, E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton, could not obtain the consent of their co-partner, Jacob Miller, to join with them as a plaintiff in prosecuting this action, and for that reason said Jacob Miller was made a defendant therein; but that since that time, and at the time of the filing of the supplemental complaint herein, the consent of the said Jacob Miller to be joined as a plaintiff herein was obtained, and he now consents to join with said plaintiffs in the prosecution of this action, and he is therefore, joined with them as plaintiff herein.

And from the foregoing facts the Court finds the following:

Conclusions of Law.

I.

That the plaintiffs, F. F. Britton, Mrs. A. L. Emerson and Jacob Miller, are the owners of, subject only to the paramount title of the United States, and are entitled to the possession of all the mine and mining property described and referred to in the plead-
56 ings herein, and which is more particularly described as follows, to-wit: That certain quartz mine and mining property situate at Second Garotte, southwest of the Big Oak Flat and Yosemite Road, and about two miles easterly from the town of Groveland, in the County of Tuolumne, State of California, and known as and

called the "Slap Jack Mining Claim," being 1,500 feet in length along the vein, and 600 feet in width, and being the same quartz mine and mining claim located by Walter J. Coyle, on the 1st day of January, 1896, and a copy of the notice of location which is recorded in the office of the Mining Recorder of the Tuolumne Mining District, County of Tuolumne, State of California, in Vol. 7 of Quartz Claims, at page 114 of the Mining Records of the said Mining District, that is to say that said F. F. Britton is the owner of an undivided 19-40 interest therein, the said Mrs. Annie L. Emerson is the owner of an undivided 19-40 interest therein and the said Jacob Miller is the owner of an undivided one-twentieth interest therein.

II.

That the defendants have not, and each of them have not any right, title or interest or estate of, in or to the lands, premises and mining property herein described and referred to, or any part
57 thereof, and the said defendants are not, and each of them is not, entitled to the possession thereof.

III.

That at the time of the attempted location of said land by R. S. McWhirter, the grantor and predecessor in interest of the defendant, Yosemite Gold Mining and Milling Company, as aforesaid, the lands and premises sought to be located by him were not vacant public mineral lands of the United States, and were not subject to location by said R. S. McWhirter, or by any other person, but that said land was, at that time, and at all the times herein mentioned since the 1st day of January, 1896, has been and now is, included within the "Slap Jack Mining Claim," located by Walter J. Coyle on the 1st day of January, 1896, as aforesaid, and at all times herein mentioned since the 1st day of January, 1896, the said "Slap Jack Mining Claim" was and now is, a valid and subsisting mining claim, and that the right, title and interest of the plaintiffs to said Slap Jack Mining Claim has not been forfeited.

IV.

That the defendants, Harry Argall and F. L. Argall, did not forfeit their interest in said Slap Jack Mining Claim by reason
58 of their failure to contribute and pay to the plaintiffs herein their proportion of the annual labor and expenditures made by the plaintiffs upon the said mining claim during and for the year 1898, because the notice requiring said defendants, Harry Argall and F. L. Argall to contribute and pay their proportion of such annual labor and expenditures, was served upon said defendants, Harry Argall and F. L. Argall, after they had transferred and conveyed to the Yosemite Gold Mining Company all of their right, title and interest of, in and to said mine and mining claim.

V.

That the question of the ownership of the 19-20 interest of, in and to said "Slap Jack Mining Claim" and the question of who were the

successors in interest in said mining claim of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, was involved and was a material issue in the redemption suit prosecuted in this Court by the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, against the defendant, Yosemite Gold Mining and Milling Company, a corporation, and others, as aforesaid, that it was adjudged and determined by this Court in and by the judgment and decree made, given and rendered in said redemption suit, that the
59 plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, were the owners of 19-20 interest of in and to said Slap Jack Mining Claim and that they were the successors in interest in said mining claim, of Harry Argall and F. L. Argall, B. Griswold and F. L. Emerson, the judgment debtors in the foreclosure action aforesaid; that said judgment and decree had become final at the time of the trial of this action; that said judgment and decree is a final and conclusive determination of both of the questions aforesaid as between the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson, and the defendant Yosemite Gold Mining and Milling Company, that said judgment and decree is a complete bar to the further litigation of either of such questions, and the defendants, Yosemite Gold Mining and Milling Company is now estopped by said judgment and decree from disputing the ownership of the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson to said 19-20 interest of in and to said "Slap Jack Mining Claim."

VI.

That the plaintiffs are entitled to a decree of this Court quieting their title to all of the lands, premises and mining property described in the pleadings herein, and which are herein above described,
60 and also adjudging that all persons claiming or to claim the same or any part thereof, under or through the said defendants, or either of them be enjoined and debarred from asserting any title thereto, adverse to the plaintiffs.

VII.

That the plaintiffs are entitled to judgment against the defendants for their costs incurred herein. And let judgment and decree be entered herein accordingly.

Dated this 25th day of June, A. D. 1902.

G. W. NICOL,
Judge of the Superior Court.

Finel June 25th, 1902.

J. B. DOYLE, *Clerk.*

Decree.

(Title of Court and Cause.)

The above entitled cause came on regularly for trial on the 17th day of February, A. D. 1902, before the Court sitting without a jury,

a trial by jury having been duly waived, Hon. G. W. Nicol, Judge presiding, Mr. J. P. O'Brien and Mr. Crittenden Hampton
61 appeared as counsel for the plaintiffs, and Mr. F. W. Street, Mr. W. C. Kennedy and Will M. Beggs appeared as counsel for the defendants.

Whereupon evidence, oral and documentary was adduced, and said cause was submitted to the Court for its decision, and the Court having fully considered the same, and having rendered its decision thereon, in writing, and having ordered that a decree be entered in accordance therewith.

It is therefore hereby ordered, adjudged and decreed, that the plaintiffs, F. F. Britton, Mrs. A. L. Emerson and Jacob Miller, are the owners of, subject to the paramount title of the United States, and are entitled to the possession of all that certain quartz mine and mining property described and referred in the pleadings herein and which is more particularly described as follows, to-wit: That certain quartz mine and mining property situate at Second Garotte, southwest of the Big Oak Flat and Yosemite Road, and about two miles easterly from the town of Groveland, in the County of Tuolumne, State of California, and known and called as the Slap Jack Mining Claim, being 1,500 feet in length along the vein, and 600 feet in width, and being the same quartz mine and mining claim located by Walter J. Coyle on the 1st day of January, 1896, a copy of the notice of location of which is recorded in the office of the Mining Recorder of the Tuolumne District, County of Tuolumne,
62 State of California, in Vol. 7 of Quartz Claims, at page 114 of the Mining Records of said District; that is to say, the said F. F. Britton is the owner of an undivided 19-40 interest therein, the said Mrs. Annie L. Emerson is the owner of an undivided 19-40 interest therein, and the said Jacob Miller is the owner of an undivided 1-20 interest therein.

It is further ordered, adjudged and decreed that the title of the plaintiffs thereto, as aforesaid, be, and the same is hereby adjudged and decreed to be quieted against all claims, demands and pretentions of the defendants.

It is further ordered, adjudged and decreed that all adverse claims of the defendants or of either or any of them, and of all persons claiming or to claim any part of the mine and mining property hereinabove described, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless, and they are hereby perpetually enjoined and restrained from setting up any claim thereto, or to any part thereof.

It is further ordered, adjudged and decreed that the plaintiffs have and recover of and from the defendants their costs incurred herein and which are taxed at the sum of $45.

63 Dated this 28th day of June, A. D. 1902.

G. W. NICOL,
Judge of the Superior Court.

Filed June 25th, 1902.

J. B. DOYLE, *Clerk.*

Statement.

[Title of Court and Cause.]

The above trial came on regularly for trial before the Hon. G. W. Nicol on the 17th, 18th and 19th days of February, 1902, in the Superior Court of the State of California in and for the County of Tuolumne, J. P. O'Brien, Esq. and Crittenden Hampton, Esq. appearing as counsel for plaintiffs; W. C. Kennedy, Esq., F. W. Street, Esq., and Will M. Beggs, Esq. appearing as counsel for the defendants. Whereupon the following proceedings were had and the following evidence adduced.

WALTER J. COYLE was called by plaintiffs, sworn and examined testified as follows:

My name is Walter J. Coyle. I reside at Second Garotte, in the County of Tuolumne, State of California. I have resided
64 there about 35 years; born and raised there. I am well acquainted in that vicinity. I know the mine commonly known as the Slap Jack mine. I knew that mine about the 1st of January, 1896. I was on the property on that day. I located that mine on January 1st, 1896. I made my location by putting up my monuments and posting one notice on the east end. The mine lays pretty nearly east and west. I put up four monuments, one at each corner, and a center stake; I put a monument at each center stake. I put two center stakes at the end. I put the center stake right on the center of the mine, right on the ledge at the end of the claim. That is I stepped out 300 feet on each side and put up my corner stakes and mounds of rock and stone. All mounds were of that character. I know that there is a ledge of gold-bearing quartz on that location. The ledge contains gold and other valuable metals. When I located it was open public government land, open for anybody. These monuments were permanent monuments so they could be easily and readily seen. After making my notice of location I recorded a copy of the notice in the Tuolumne County Records.

Thereupon Mr. Hampton offered in evidence the notice of location, found in Vol. 7, Book one, Page 114 of Quartz Claims,
65 Tuolumne Mining Records, to which offer the defendant objected on the ground:

1st. That the notice is incompetent for any purpose in this case.

2nd. On the ground that no proper foundation has been laid, showing that there has been a valid location of the mine described in the complaint in accordance with the United States laws, and local rules and regulations of the Tuolumne Mining District in which said claim is situated, in this: That according to the testimony of the witness he only posted one notice upon the claim, to-wit: at the east end; that such posting of a notice is not sufficient for the location of a mining claim.

I was a native born citizen of the United States and 33 years of age when I made that location.

The Court overruled the objection, to which order and ruling the defendants then and there excepted, and thereupon the plaintiffs offered in evidence plaintiffs' Exhibit "1."

Notice Marked Plaintiffs' Exhibit "1."

The undersigned claim fifteen hundred (1500) feet in length and three hundred (300) feet in width on each side of the middle of this quartz vein or lode for mining purposes, situate in Tuolumne Mining District, County of Tuolumne, State of California, about two miles from the town of Groveland in an easterly direction and situ-
ated in Second Garotte, about one-fourth mile from Pool's
66 house and about one-fourth mile from the house known as the George house, the said vein running in an easterly and westerly direction and bounded on the east by the White claim. The location and extent thereof being more fully described as follows: Said claim commencing at the notice which is posted on an oak tree and running in an easterly and westerly direction on and along the vein fifteen hundred feet to a similar notice which is posted on a pine tree at the end of the claim. Also monuments of stone set three hundred feet from the center line of said claim at each end and known as the Slap Jack Mining Claim. I will hold and work the same as required by the United States Local Regulations of said Tuolumne Mining District.

Located on the 1st day of January, 1896.

Locator: WALTER J. COYLE.

Witness:
F. L. GOODNOW,
E. B. JAMES,
E. A. BLUME.

Recorded at request of Walter J. Coyle, Jan. 13, 1896, at 10 min. past 9 o'clock A. M., in Vol. 7, of Quartz Claims, page 114, of Tuolumne Mining Records.

L. P. CANNON,
Mining Recorder.

F. T. MURNAN, *Deputy.*

(COYLE continuing:) I think that is a copy of the notice posted on the claim, and it was recorded at my request. I was a citizen of
the United States when I made that location, over the age of
67 21 years. Native born. Aged 33 years.

I posted another notice during that month upon the claim. I located on the 1st day of January, and then I thought probably that was a holiday. I located, I think, about the third. Some where along there. Re-located. Put up one notice at the east end; the second notice was put on the east end of the claim, the same end. On the same end of the claim as the first notice. In the same place. I

caused a copy of this notice to be recorded with the County Recorder. I said it was posted on the 3rd. It was the 2nd or 3rd. This was recorded at my request.

The said second notice was then offered in evidence by the plaintiffs, to which offer the defendants made the same objection as to plaintiff's Exhibit 1:

The COURT: Did you erect new monuments the-, Mr. Coyle?

A. The same monuments.

Q. You adopted the same monuments as before?

A. Yes Sir.

Q. Just re-located it?

A. Just re-located it—the same old monuments.

Q. These monuments are permanent monuments, and can be readily seen?

68 "A. Yes, sir, they are there yet."

And the Court thereupon overruled said objection, to which order and ruling the defendants then and there excepted, and thereupon there was admitted in evidence plaintiff's Exhibit "2."

Notice.

The undersigned claim fifteen hundred (1500) feet in length and three hundred (300) feet in width on each side of the middle of this quartz vein or lode for mining purposes, situate in Tuolumne Mining District, County of Tuolumne, State of California, two miles from the town of Groveland in an easterly direction and situated in Second Garotte, about one-fourth (¼) mile from Pool's house and about one-fourth (¼) mile from the house known as the George house, the said vein running in an easterly and westerly direction and bounded on the east by the White claim. The location and extent thereof being more fully described as follows: The said claim commencing at this notice which is posted on an oak tree and running in a- easterly and westerly direction on and along the vein fifteen hundred feet to a similar notice which is posted on a pine tree at the end of the claim. Also side monuments of stone set three hundred feet from the center line of said claim at each end and known as the Slap Jack Mining Claim. I will hold and work the same

69 as required by the United States Local Regulations of said Tuolumne Mining District.

Located on the 2nd day of January, 1896.

Locator: WALTER J. COYLE.

Witness—

E. A. BLOOM.

E. B. JAMES.

F. L. GOODNOW.

Recorded at the request of Walter J. Coyle, Jan. 20, 1896, at 20 min. past 9 o'clock A. M., in Vol. 7, of Quartz Claims, pages 136-137 of Tuolumne County Mining Records.

L. P. CANNON,
Mining Recorder.

By F. T. NURNAN, *Deputy.*

The COURT:

Q. You posted two notices, both on the same end?

A. Yes, sir; one, each location, on the east end.

The west end is much higher; the east end is low and flat. On the west end there is a high mountain. I don't know anything about the other end for I never saw it. I do not know where it goes to. Because there is a big iron mountain. On the east end it runs through a flat, where it joins on the Saul White claim. I am not the owner of this claim now, for I sold it to Emerson and Argall by deed for $1,000.

"At the time I located the Slap Jack mine, I discovered a gold bearing vein within the limits of the claim. The monuments placed upon the claim by me so marked the claim that the boundaries could be readily traced. The Slap Jack Mining claim located by me is the same ground and property that is in controversy in this action under the name of the Slap Jack Mine or the Slap Jack Mining Claim."

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Thereupon the plaintiffs offered in evidence a grant, bargain and sale deed from Walter J. Coyle to Harry Argall and F. L. Emerson, F. L. Argall and Benson Griswold, dated August 6, 1896, Wherein and whereby he granted and conveyed to said Harry Argall, B. Griswold, F. L. Emerson and F. L. Argall, all of said Slap Jack Mining Claim, and which said deed is recorded at page 275, Vol. 31, Book "A" of Deeds, Tuolumne County Records, to which offer the defendants then and there objected on the ground that it had not been shown that the grantor named had any right, title or interest whatsoever to convey to the grantees named therein, in that, it has not been shown that he made a valid or any location whatsoever of the Slap Jack Mining Claim.

The Court then and there made an order overruling said objection, to which order and ruling the defendants then and there excepted, and thereupon the said deed was admitted in evidence and marked plaintiffs' Exhibit "3," and thereupon plaintiffs' offered in evidence a deed from F. L. Emerson to Annie L. Emerson; also a deed from F. L. Argall to Jacob Miller; also a deed from Annie L. Emerson to F. L. Emerson; also a deed from Benson Griswold *et ux* to F. F. Britton; also a deed from Benson Griswold to W. W. Gray; also a deed from W. W. Gray to E. L. Emerson; also a deed from F. L. Emerson to A. L. Emerson; also a power of attorney from Mrs. A. L. Emerson to E. L. Emerson; also a deed from E. L. Emerson to F. F. Britton; to each of which offers the same objection was made as to plaintiffs' Exhibit "3," and the court overruled each of said objections, to which order and ruling the defendants then and there excepted; whereupon the said deeds were offered in evidence and marked respectively plaintiffs' Exhibits "4," "5," "6," "7," "8," "9," "10," "11," and "12."

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(Said Exhibits, together with the plaintiffs' Exhibit three are in substance as found by the Court in its findings.)

Thereupon the plaintiffs offered in evidence their proof of labor filed in the County Recorders office of Tuolumne County on Decem-

ber 27th, 1898, showing proof of labor upon this Slap Jack mine, to which offer the defendants then and there objected upon the ground:

1st. That it does not appear from the evidence that the parties named in the claim of proof of labor have ever been the owners of, or entitled to any interest whatsoever in and to what is termed in the notice, the Slap Jack Mine, in, that it has not been
72 shown that any location of a claim was ever made as required by Section 2224 of the Revised Statutes of the United States, or the mining rules and regulations of the Tuolumne Mining District.

2nd. That the labor claimed to have been performed as set forth in the affidavit of labor, does not appear to have been labor done in the development of the vein or lode situated in the mining ground in controversy.

The Court overruled said objection, to which order and rulings the defendant then and there excepted, and thereupon there was offered in evidence plaintiffs' Exhibit "13"; and which is in words and figures following, to-wit:

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

Before me the subscribers personally appear, E. L. Emerson and F. F. Britton, who being duly sworn, say that at least one hundred dollars worth of labor was performed upon the Slap Jack mining claim, situate in Tuolumne Mining District, County of Tuolumne, State of California, and being more particularly described as follows: Being that certain mining claim fifteen hundred feet long by six hundred feet wide, and situate at Second Garotte, ¼ mile south of the Yosemite road, and about ¼ mile from the
73 George House, in Tuolumne Mining District, (sometimes known as Big Oak Flat District), in Tuolumne County. Said labor consisted of taking water out of the shaft, and work upon shaft and upon ledge, said labor was performed during the year ending December 31st, 1898. Such expenditures were made by or at the expense of E. L. Emerson and F. F. Britton, owners in said claim for the purpose of holding said claim.

F. F. BRITTON.
E. L. EMERSON.

Subscribed and sworn to before me this 12th day of December, A. D., 1898.

[SEAL.] W. A. PARKHURST,
Notary Public.

Endorsed: Proof of labor, Slap Jack. Filed December 27th, 1898, at 3 min. past 1 o'clock P. M. F. T. Murnan, Recorder.

(10 cents cancelled, I. R. S.)

Thereupon the plaintiffs offered in evidence the proof of labor upon the Slap Jack mine filed in the office of the County Recorder of Tuolumne County, January 27th, 1899, to which offer the defendants then and there objected upon the same ground as made to plaintiffs' Exhibit "13," and the Court then and there made an order overruling said objection, to which order and ruling
74 the defendants then and there excepted, and thereupon there was admitted in evidence the said Proof of Labor and marked plaintiff's Exhibit "14" and which is in words and figures following to-wit:

Proof of Labor.

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

Before me the subscriber personally appeared, F. F. Britton, who, being duly sworn, says: That at least one hundred ($100) dollars' worth of labor or improvements were performed or made upon the Slap Jack mine, located at Second Garrotte, one fourth mile S. W. of Big Oak Flat and the Yosemite road, said labor consisting of excavating two open cuts, and draining tunnel and clearing off brush. One cut about of average width of about five feet by fifty feet long on vein, and seven (7) feet deep, also an open cut on vein about six feet wide by two feet in depth by twenty feet long, situated in Tuolumne Mining District, Tuolumne County, State of California, for the year ending December 31st, 1898. Such expenditure was made by or at the expense of F. F. Britton and E. L. Emerson for the owners of said claim, for the purpose of holding said
75 claim.

F. F. BRITTON.
(Signature.)

Subscribed and sworn to before me this 26th day of January, 1899.
CRITTENDEN HAMPTON,
Notary Public in and for Tuolumne County, California.

Filed January 27th, 1899, at 45 minutes past 10 o'clock A. M., at request of Crittenden Hampton.

R. INCH,
Recorder of Tuolumne County.

(10 cents cancelled, I. R. S.,)

Dr. F. L. ARGALL was called by plaintiffs, sworn and examined testified as follows:

I am a dentist engaged in that business at San Jose, and have been so engaged about eighteen years. I suppose I am one of the defendants, I don't know much about it. I am the Dr. F. L. Argall named as one of the defendants. At one time I owned an interest in the Slap Jack mine; the mine in controversy in this case. I made a conveyance to the Yosemite Gold Mining Company of my interest. I did not perform or cause to be performed any labor upon the Slap

Jack mine during the year 1898. I don't remember. My best judgment is I don't think we did. I did not ever contribute to any of my co-workers my proportion of the labor performed upon the
76 Slap Jack mine by them during the year 1898.

I was served by my co-owners after the year 1898. This is the notice that was served upon me.

And thereupon the plaintiffs offered in evidence the notice, together with affidavit of services attached thereto, showing personal service upon each of the parties named.

"The notice, together with the affidavits, were duly recorded in the office of the County Recorder of Tuolumne County, on March 31st, 1900.

Mr. STREET: I think before it is received in evidence it is incumbent upon counsel to fix the date of the conveyance of all or any interest in the Slap Jack mine to the Yosemite Gold Mining Company; I would like to know the date of the conveyance.

Mr. O'BRIEN: We will offer that deed in evidence in connection with the evidence.

Mr. STREET: What was the date of the conveyance, Mr. Argall?

A. I don't remember the date, sir.

Mr. O'BRIEN: We will offer the deed in evidence in connection with the testimony.

Mr. STREET: I think that should appear before they offer this.

Mr. O'BRIEN: State, Dr., whether or not the conveyance from you to the Yosemite Gold Mining Company was delivered to that
77 company before or after that notice was served on you?

A. Well, I am not sure as to that.

Q. What is your best judgment?

A. I think that I got the notice from Mr. Emerson before I made my transfer to the company.

Q. What is your best judgment about whether the notice was received by you before you delivered the deed?

A. Well, I can't give any more than I gave; I am not positive.

Q. What is your best judgment?

A. I think I was given the notice before the delivery of the deed; I think that is pretty near correct."

To which offer the defendants then and there objected on the ground that the Revised Statutes of the United States, Section 2324, provides, upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, co-owners who have performed the labor or made the improvements, may, at the expiration of a year, give such delinquent co-owner personal notice in writing of such failure, and should he fail or refuse, why then his interest shall be forfeited to the other co-owners who have made the expenditure. According to the affidavit of labor presented here, the co-owners who made the expenditures are F. F. Britton and E. L. Emerson, and this notice is made by E. L. Emer-
78 son, F. F. Britton, Jacob Miller and Annie L. Emerson, and it does not appear from the evidence in this case that Jacob Miller or A. L. Emerson have done any work whatsoever upon this claim, or contributed any part of or portion of this expenditure made

by E. L. Emerson and F. F. Britton. Upon the further ground, the said notice is defective in this: That it fails to specify the amount in the notice to be paid by Harry Argall or F. L. Argall, or either of them. To which objection the Court then and there made an order overruling said objection with leave to strike out. To which ruling and order the defendants then and there excepted. And thereupon the said notice and affidavits were admitted in evidence and marked plaintiffs' Exhibit "15," which are as follows:

Notice.

To Harry Argall and F. L. Argall:

You will please take notice that the undersigned have, for the year 1898, expended one hundred ($100) dollars in labor and improvements upon the Slap Jack mining claim, situate at Second Garotte, about one-fourth of a mile from the Yosemite road in the Tuolumne Mining District, County of Tuolumne, State of California, and that said labor and improvements were performed and made by
79 the undersigned for the purpose of holding said mine, and as and for the assessment work thereon for the year 1898.

And you will further take notice, that you, and each of you, as co-owners with the undersigned in said Slap Jack mining claim, have failed to contribute or pay your portion of the expenditures so made by the undersigned, as aforesaid.

You are, therefore, hereby notified that if you, or either of you, fail or refuse, within the time required by law, to contribute or pay to the undersigned your portion of the expenditures made by them upon said mine as aforesaid, then, and in that event, your interest in the Slap Jack mining claim, or the interest therein of either of you so failing to contribute or pay his portion of said expenditures, shall thereupon belong to and become the property of the undersigned by virtue of the Statute in such cases made and provided.

Dated this 18th day of December, A. D., 1899.

E. L. EMERSON.
F. F. BRITTON.
JACOB MILLER.
MRS. A. L. EMERSON.

Attached to which notice is an affidavit by Z. L. Cornwell, showing service upon Harry Argall in Tuolumne County on the 21st day of December, 1899, and also an affidavit of Wm. Wyman, showing service on Dr. F. L. Argall in Santa Clara County on the
80 20th day of December, 1899.

"After I received the notice which has been introduced in evidence here, I took it to Mr. Beggs and Mr. Berg."

"Mr. Berg is President of the company. He was president of the Yosemite Gold mining Company. My best judgment is that at that time I had not delivered the deed."

"I delivered the deed to Mr. Berg."

And thereupon the plaintiffs offered in evidence a deed dated May 31st, 1899, between Harry Argall and F. L. Argall to the Yo-

semite Gold Mining Company, a corporation, recorded January 12th, 1900, in Book "A," Vol. 43, Page 182, Tuolumne County Records. The deed is acknowledged by F. L. Argall on September 29th, 1899, and by Harry Argall on October 2nd, 1899, and recorded January 12, 1900. Said deed is admitted in evidence and marked plaintiffs' Exhibit "16."

The only dealings I had for the transfer of our interest in the Slap Jack property were had with Mr. Berg and Mr. Beggs. Mr. Beggs was the attorney for the Yosemite Gold Mining Company.

"At that time the negotiations for the transfer were had by Mr. Beggs and Mr. Berg on behalf of the company with me."

I delivered the notice to Mr. Berg the same evening it was delivered to me. It was at the residence of Mr. Beggs and Mr. Berg in San Jose.

81 Q. What if anything was said to you at time by either of them about the notice? To which question the defendant objected upon the ground that it is irrelevant and immaterial, to which objection the Court then and there made an order overruling the same, to which ruling and order the defendants then and there excepted, and the witness being directed to answer said:

A. Mr. Beggs paid no attention to it.

"Mr. Berg was present at that time." ("It is admitted that Mr. Peter Berg was the President of the Yosemite Gold Mining Company at that time.")

(Recess until 1:30 p. m., Feb. 17th.)

(Dr. F. L. Argall continuing.) The deed from me and my brother to the Yosemite Gold Mining Company was delivered somewhere between January 1st and the 10th, 1900. Prior to the date of its delivery the deed was in my possession. "At no time from the date when it was signed by me up to the date of its delivery, as I have testified, had that deed passed from my control." It was signed by me first and then I sent it to my brother and then he sent it back to me. I had it until its delivery to Mr. Berg, all during the time that intervened from that date it was in my possession or under my control. I cannot say exactly when the notice was delivered to Mr. Berg; I think it was in December; I cannot exactly

82 tell; it might have been somewhere around the middle of the month. I delivered it to him the same day it was served upon me.

Cross-examination.

By Mr. KENNEDY:

The deed which was exhibited to me this morning marked Exhibit "16" was acknowledged by me. I do not know when. I was at Mr. Beggs' office. I left the deed with Mr. Beggs. He represented the Yosemite Gold Mining Company. Exhibit "15" is the notice which was served upon me. I received it about the middle of December. When I received the notice I took it down to show it to Mr. Beggs and Mr. Berg at their residence.

Mr. KENNEDY: Was there an agreement between you and your brother, Harry Argall, and Emerson and Britton by which work that you and Harry Argall had done in 1897 on the claim was to be a standoff to you, and that they in consideration of that, were to do your portion of the work in 1898?

A. That was in regard to taking the water out.

Q. In regard to taking what water out?

"A. Out of the mine.

A. That is the work of taking out the water in the claim in 1898?

A. Yes, sir.

83 The COURT: I understand you to say that there was such an agreement that work done by you in 1897 should be offset by work done by them in 1898?

A. Yes, sir, that was the verbal agreement we had between us.

Q. Did you and your brother do the work in 1897?

A. No, sir, not all of it, no, sir.

Q. Did you and your brother do the work in 1897?

A. No, sir, not all of it.

Q. How much did you do?

A. Done our proportion.

Q. In 1897?

A. Yes, sir.

Q. Why then, was the agreement made between you that your work done in 1897 was to release you from doing your work in the pumping of the shaft out in 1898?

A. Well, we wanted an expert to look at the mine, and my brother took the water out of the mine for him, and sometime afterwards we had another party look at it, and Mr. Emerson and Mr. Britton agreed to take the water out themselves at that time.

Q. One job was to stand off the other, that right?

A. Yes, sir.

84 We wanted an expert to look at the mine and my brother took the water out of the mine for him, and some time afterwards we had another party to look at it, and Mr. Emerson and Britton agreed to take the water out themselves at that time. One job was to stand off the other. My brother took the water out in 1897. That agreement was in writing. I do not know where it is, I have not got it. I think I left it with my attorney, Mr. Welch, in San Jose.

"Q. Doctor, on the 29th of September you delivered that deed in question to Mr. Beggs. Is it not a fact that Mr. Beggs retained that deed and sent it up by mail to Harry Argall to be by him acknowledged before Murrow, Notary Public for this county?

A. I don't know what he did with it.

I do not remember seeing the deed after that. It cost about $120 or $130 in 1898 to pump the water out and my brother and I was to be released from any liability for that work. I do not remember at the time this notice was served what other work had been done upon the Slap Jack mine for the year 1898 besides pumping the water out. I suppose I was informed at the time the notice was served what work

had been done. I suppose my brother informed me. He attended to that work at the mine.

I knew as a matter of fact how much we had to pay for our
85 proportion of the work in 1898, outside of the pumping of the water at the time when that notice was served; our proportion, both was $45.

Q. You don't seem to understand me. Did you know at that time what your proportion of the work of 1898, outside of the pumping of the water was; now excluding the pumping of the water, you say that was $120 or $130, outside of that, what amount of work for 1898 did you understand you were responsible for?

A. For the assessment work.

Q. Well, what amount?

A. $45, outside of the pumping of the water.

Q. Outside of pumping the water?

A. Yes, sir.

Q. In other words, there was done that year how much altogether, outside of pumping the water?

A. $100."

My brother worked for me for my interest in the mine; he represented me in the assessment work. I had my arrangements with him in regard to doing that work. I did not say I was owing Emerson and Britton $45 when the work was done by my brother and under arrangements by my brother and myself. I was not owing Emerson and Britton anything. Nothing for any portion of the work done in 1897. This agreement about taking out the water was

made between myself and Griswold. The consideration for
86 the execution and delivery of Exhibit "16" was the issuance and delivery to me of 35,000 shares of stock of the Yosemite Gold Mining Company. The stock was issued after the deed was delivered; my brother brought it over to me; I think so, I don't remember. I was not present when it was delivered to my brother for me.

Redirect examination of Dr. F. L. ARGALL:

By Mr. O'BRIEN:

—. Doctor, in reply to a question asked you by Mr. Kennedy, you testified that after you acknowledged this deed which was shown you by Mr. Kennedy, on the 29th of September, 1899, before Will M. Beggs, you left it with Mr. Beggs?

A. Yes, sir.

Q. State whether or not Mr. Beggs was your attorney at that time?

A. He was supposed to be my attorney, yes, sir.

Q. Did you at that time leave that deed with Mr. Beggs for the purpose of delivery or handing it to the company?

A. Yes, sir.

Q. State whether or not you told Mr. Beggs at that time to deliver it to the company

A. I don't remember telling him that at all.

Q. What is your best recollection?

87 A. He acted as our attorney and I left the deed with him.

Q. Did you leave it with him as your attorney?

A. Yes, sir.

Q. Did you leave it with him as attorney of the Yosemite Gold Mining Company?

A. Yes, because he was acting as attorney for us all.

Q. Had the deed at that time been signed by your brother?

A. If I remember right we signed it at that time. I have an idea I don't remember whether I was in the office alone with him.

Q. Well, can you state by referring to the deed and refreshing your memory. It is acknowledged by you September 29th, and by him October 2nd?

A. Well, I am not sure of it.

Q. Had you, when you signed this, received the consideration for the deed?

A. No, sir.

Q. State what purpose you had in leaving the deed with Mr. Beggs.

A. If I remember rightly, Mr. Beggs said he needed it to go on and do the business.

Q. State whether or not you had that deed in your possession.

A. No, sir.

Q. After you had left it with Mr. Beggs?

88 A. Yes, I had the deed in my possession after it was signed, yes, sir.

Q. Then state whether or not you kept it in your possession till the transaction between you and the company was closed, and the deed delivered.

A. I have kept it in my possession till I delivered it over to Mr. Berg.

Q. State whether or not that was after you had left the deed with Beggs that you had it in your possession and kept it till January, 1900?

A. Well, this quit deed was signed in my office, I was busy working at the chair, Mr. Beggs came over to me and said, "Doctor, I have got a paper I would like you to sign," said, "it don't amount to anything, just a matter of form." I left the chair and went and signed it and sent it to my brother, and my brother sent it back to me and told me to keep it.

Q. Did you keep it?

A. Yes, I kept it till I delivered it over to Mr. Berg.

Q. In reply to Mr. Kennedy, you testified about some understanding between you and your brother and Mr. Emerson and Mr. Britton about unwatering the mine?

A. Yes, sir.

Q. What was that understanding?

89 A. Well, as I said before, at one time there was a party going to look at the mine and there was water in it.

Q. When was that?

A. Well, I don't remember the date. My brother got the water out; and then there was another time another party wanted to look

at it, and the water was in, and I spoke to Mr. Emerson about it, and told him we got the water out once, and probably they would get it out this time, and he said they would do it.

Q. Was there any understanding that the taking out of the water by them should be to your credit on assessment work for 1898?

A. No, sir.

Q. Do you remember when the water was got out by your brother?

A. No, sir, I can't tell.

Q. Was it in the year 1898?

A. It was before it was taken out the first time, but I don't remember the date.

Q. Was it before Britton and Emerson took it out?

A. Yes, sir.

Q. Then state whether or not you contributed or paid to Messrs. Britton and Emerson anything for the work performed by them upon the Slap Jack mine for the year 1898?

A No, sir.

90 Q. And what was your proportion?

A. $45.

Q. Has that ever been paid?

A. No, sir.

Recross examination of Dr. F. L. ARGALL:

"If it would turn out that the only water Mr. Emerson ever did take out was in 1898 I was not to pay for it, nor was my brother to pay for any portion of it."

If there was only $100 worth of work done on the mine in 1898, including the taking out of the water, I was to pay and my proportion for 1898 would be $45. It cost $120 or $130 to take the water out in 1898.

Q. Then the $45 that you and your brother were to pay was upon the proposition that there was $100 worth of work outside of the water, pumping water, is that correct?

A. Yes, sir.

Q. And if there was not any work outside of the water, then you were not to pay anything?

A. Was not any understanding that way at all.

Q. Were you to pay a part of the water?

A. No, sir.

I signed two deeds for that property. I do not remember
91 when I signed the other. The quit claim deed is the last one. The first deed was made to Mr. Berg; if I remember right it was to the same property. I cannot tell when that deed was made or delivered; it was before this last one. It was more than two months before. It was a deed of my interest in the Slap Jack mine. My brother joined in that deed. That deed was left with Mr. Beggs. I could not tell whether we both signed it in San Jose or not; I signed it in San Jose. It was acknowledged.

Q. And delivered it to Mr. Beggs?

A. Well, he made up the deed, and I suppose it was signed before him.

Q. And he took it?
A. Yes, sir.
Q. What was the consideration for that deed?
A. Well, we were to get some stock.
Q. How much?
A. Well, I don't remember what was decided on at that time, but we got 35,000 shares.
Q. Was any stock delivered to you at the time you made that deed?
A. No, sir.
This last deed was acknowledged before Mr. Beggs in his office and he took it away with him.

92 I understood that it was a deed of my interest in the Slap Jack mine. Mr. Beggs sent it to my brother. My brother sent it back to me by mail. The day this stock was delivered to us my brother and I had to borrow some money from a Mr. Crothers to buy the stamps. On the same day the stock was issued to me, my brother and Jim Paul. It was all issued the same day. The stamps were cancelled the same day the stock was issued. The day the deed was delivered by me to Mr. Berg the latter came over to my office with Mr. Rayburn, and Mr. Berg was at the head of the stairs and said, "Dr. how about that deed?" I said, "I do not know Mr. Berg." He said: "I want it." I remember the words exactly. I said, "I have not consulted anybody in regard to it," and we talked a little while and he got mad and said: "If you do not give up the deed you won't have a damn share of the stock," and walked down stairs. I said, "Mr. Berg I do not want any talk about this." Then he came up and talked a little more, and my brother said we had better give it to him, and I went into the office and gave it to him. I do not know whether that was the day the stock was transferred or not. The deed was delivered to Mr. Berg in the presence of my brother and Mr. Rayburn. Mr. Beggs was not present; it was at my office. It was about a week after the deed came back from my brother. Mr. Berg told me that if I did not deliver the

93 deed I would not get any stock. Just a few moments after this the deed was delivered. I made two deeds to the Slap Jack property. The consideration for both deeds was an interest in the mine in the shape of stock.

HARRY ARGALL was called by the plaintiffs, sworn and examined testified as follows:

I am one of the defendants in this case. I reside at Second Garotte, in this county; have resided in this county a number of years. I know the Slap Jack mine. I have known that property since 1896. I was one of the owners of the property in 1898. I was one of the owners of the Slap Jack mine, in controversy in this case, until it was jumped. I did not perform any labor upon that mine in 1898, and neither did I contribute to pay my coowners my proportion for the labor for that year; not one cent. There was a notice served upon me by Messrs. Emerson and Britton. This is a copy of the notice. After that notice was served

upon me I did not contribute and pay to my co-owners my proportion of the assessment work for the year 1898. After I received the notice I sent it down to M. Beggs in San Jose by mail. I am the Harry Argall mentioned in the deed, plaintiff's Exhibit "16," to the Yosemite Gold Mining Company, dated May 31st, 1899, and acknowledged by my brother September 29th, 1899, and
94 by myself on October 2nd, 1899, and recorded January 12th, 1900.

"Well, I don't know when this deed was delivered by me to the Yosemite Gold Mining Company, or to anyone in behalf of that company; I sent the notice down, and when I went down I delivered the deed up; I went down after I sent the notice down."

It must have been the fall of the year some time when the deed was delivered. I went down to spend the holidays, and that is the time I got the deed, too. I think it was Christmas. It was after the notice was served on me. I was down there not very many days before I delivered the deed. I think it was in December. The latter part of December. I delivered the deed to Mr. Berg. Mr. Berg was there, and Mr. Beggs, and Mr. Rayburn, and Mr. Smith, I am positive as to that. It was delivered in Mr. Beggs' office. The only talk that we had was about the stock. The negotiations for the purchase of our interest in the Slap Jack mine were conducted with Mr. Beggs. My brother was present when the deed was delivered.

Cross-examination of HARRY ARGALL.

By Mr. KENNEDY:

—. "Mr. Argall, you remember of the agreement between
95 yourself and your brother and Messrs. Emerson and Britton, that in compensation for the work that you and your brother did in pumping the water out of the mine in 1897 they were to pump the water out in 1898?"

A. I don't remember that at all.

I never saw Mr. Emerson in my life. I got the deed by mail from Mr. Beggs. A letter accompanied the deed, written in Mr. Beggs' office. I got the stock when I gave up the deed. I didn't get the stock till I gave up the deed. I gave up the deed when I went to San Jose; somewhere in December. The day the stock was delivered Mr. Berg and Mr. Beggs cancelled the stamps. The same day the stamps were cancelled the stock was delivered, and the deed was delivered the same day in the office of Will M. Beggs, in the presence of Mr. Berg, Mr. Beggs and Mr. Rayburn. On that day we furnished the stamps for the stock that was issued to Jim Paul. I bought all the stamps for the whole business; $45 worth. Also for my brother's stock. They gave my brother's stock to me. My brother's stock was delivered to me for him. Mr. Berg cancelled the stamps. Mr. Beggs cancelled some.

E. L. EMERSON was called by the plaintiffs, sworn and examined testified as follows:

96 By Mr. O'BRIEN:

I am one of the plaintiffs in this case. I know the Slap Jack mine, situate at Second Garotte, since 1896. Annie L. Emerson is my wife. I had a power of attorney from her; it was burned up. On the 29th of January of this year the house caught fire and burned it up and most all of the papers which I had with me at that time. I had the power of attorney in December, 1899. It was not recorded. It was a general power of attorney, of the same character as that one from my brother which has been offered in evidence here. I had a power of agency from my wife. It was in writing. I had it signed by Mr. Britton and my wife. That was burned up too with the rest of the papers. I did not hold that during the month of December, 1899; that was recently. This notice, plaintiffs' Exhibit "15," signed by me as attorney in fact for my wife, was signed at the request and with the knowledge of my wife. Neither Harry Argall nor F. L. Argall, nor anyone in their behalf, has contributed or paid either to me or my wife any proportion of the assessment work upon the Slap Jack mine during the year 1898; neither has anyone claiming to be successors in interest of the Argalls contributed or paid the proportion of the Argalls for the work done in 1898. At the time of filing the original complaint in this case I could not obtain, or did not obtain, the formal consent of Jacob Miller to join as
97 plaintiff. I have since obtained his consent. That consent is not in writing.

Cross-examination:

I had that power of attorney from my wife several years. I do not know the exact date. It was not recorded. I had it three or four years. I do not know the date, year nor month. The Argalls have not contributed for the assessment work done upon the mine for the year 1898. Mr. Britton and myself done the assessment work for that year. Part of it was done in the spring and part in the fall. Well, I can not remember just what part was done. Well, I know I was up there in March, 1898. At that time I was alone. I prepared to take water out of the mine, that is one thing I know. Out of the shaft. It was the only shaft there at that time. We built a spout and got some rope and oil and we moved the sheave from the top gallows frame down part way so as to make it easy to handle the bucket. I mean Walter Coyle worked with me at that time. Quite a number worked with me before I finished taking the water out. I cannot say how many days we worked in building the spout and moving the sheave. That is so long ago, and a great many things have transpired since then. I have no recollection now
98 whether it was one day or ten. The spout was made of boards nailed together to convey the water away from the shaft. The water was taken from the shaft with a bucket. The spout was made with boards for the purpose of emptying the water and carrying it away. We made it out of ten-foot boards, ten feet long. It was

four boards, 12 inches wide. My recollection is that it was four feet wide, ten feet long and a 12-inch board on each side. It did not take us long to put that spout together. It did not take longer than half a day. The moving of the sheave wouldn't take long. It was right after the preparatory work. We erected another frame to put the sheave on. It was part of the gallows frame. We had to lay timbers across and nail them; hunt up timbers. My recollection is that Walter and I put in near a day and a half before we started to take the water out. I am not positive of that it is so long ago. Immediately after that we began to take the water out. We hoisted the water with horses. There was Gabe Mills, Charlie and Fred Smith and Walter Coyle assisting me. Also Phil Sheridan. I had horses from Gus Schroder. We used them hoisting the bucket out of the mine. I paid Smith in cash and some in checks. I paid Gabe Mills by check. I paid him $12.

This is the check marked defendants Exhibit "1." I did
99 not pay Gabe Mills any other money. That is all that he received. He drove the horses most of the time. These are the horses that hoisted the water out of the shaft. I will show you a check for $5.50 in favor of Gus Schroder; I gave this to him.

(Offered and admitted in evidence as defendants Exhibit "2"). This is all that I paid Mr. Schroder for the services of his horses in pumping out the water out of this mine. Charlie Smith drove the team. Drove his own team, not Schroder's team. What I paid Smith was for the use of his horses and his own services. I had two horses from Mr. Schroder. I paid $1 a day for the horses. This check, dated April 6th, 1898, drawn by E. L. Emerson on the First National Bank of San Francisco to the order of Chas. Smith for $15 was given by me. Admitted in evidence and marked defendants' Exhibit "3." That paid him in full for all services performed by him and his team. Fred Smith's charges are included in the $15. Mr. Sheridan worked at the landing of the bucket. I paid him by check. This check dated April 6, 1898, for $15, in favor of C. W. Sheridan, was in payment for his labor. Admitted in evidence and marked defendant's Exhibit "4." This is at the rate of $2.50 per day. I bought some hay from Clarke to feed the team with. Hay does not develop a mine. It develops horses, it
100 takes horses to develop a mine. I do not remember how much I paid Coyle for his labor pumping the water out of this shaft. I testified before that it was $21, and think that is correct. I had none others employed other than these men and myself. These men did nothing else. The object of pumping this water out was to show the mine to an expert for the purpose of selling it. For no other purpose. Not for the purpose of doing any development work; only so the expert could see it. The expert had not come at the time I left. The shaft afterwards filled up. We kept it open eight or ten days. These Smith boys kept it down for a day or two after that. This $15 paid the Smith boys was in payment for all their services, including the work of keeping the water out of the shaft. I went to San Jose the last of March. I came back to the Slap Jack mine in the fall. I believe it was in October. After we quit pumping the water out of the mine no further work was done upon the mine by

me, or caused to be done by either me or Mr. Britton until I returned in October, 1898. In either October or November we performed some work on the mine. I don't remember how much work. In my former testimony I said three days; I don't remember now. I know we worked with a pick and shovel. I don't remember the length of time. I believe we worked west of the barn. I be-
101 lieve we worked on the ledge; what is supposed to be the ledge. It was near the surface. My recollection is that we started in a hole a couple or three feet down. I did not measure the excavation. I should judge that it was about five or six feet across each way. I did not measure how deep we made it, but I remember one thing, we couldn't see over the top, and I don't know just the depth. I didn t measure it at all. I don't remember doing anything else at that time. It seems to me that I have a dim recollection of going around and looking at the corners and spending some time brushing out the side lines. I cannot say how much of these three days we spent looking at the corners. I cannot say whether it was two days or how long. I have a very dim recollection of a part of a day. We were not working in the hole the whole three days. I should say that the hole was 4 or 4½ feet deep. Mr. Britton and I did not both work in the hole at the same time. At the former trial my testimony must have been correct, wherein I said while I was in the hole shoveling Mr. Britton was on the top waiting for me to come out. We did not work at the same moment. I do not know how long a shift we took. I did not time it. He done the picking and I done the shoveling. This is all the work we did in 1898, unless I braced up the barn; maybe I braced up the barn, I cannot say. In March,
102 1898, I was there about 12 or 14 days altogether. Maybe a little more. I was not there until after January 1st, 1899. In March I remember it snowed. There was a snowstorm there before I commenced to take the water out, or while I was doing it. I don't know how many days it was before Coyle commenced preparation. I cannot say whether I commenced next day or a week after I came there. Mr. Coyle worked one shift every day; that is my recollection. I paid him, I believe, $3, or $2.50, I am not sure. I paid him, I believe, for seven shifts, $21, that is 7 days, and during that time the water was taken out of the shaft. I don't remember the exact time I stayed there after the water was taken out of the shaft; it seems to me two or three days. After that the Smith boys kept the water out. After we got the water out we were waiting for the expert to come; nothing else; that is all I could do. During the seven days that it took, if it took so long to get the water out, I was getting supplies and looking after the men, if I recollect rightly, doing some work upon the mine whenever needed, lend a helping hand and expedite matters. In getting supplies, I mean from town, Groveland. The men boarded at Walter Coyle's, except the Smith boys, who boarded at home. I telephoned to Chinese Camp for a sheave. These men did the work in reference to the pumping of the water out of the mine; they did most of it; I lent a helping hand whenever necessary. I went down the shaft
103 once to bail water into the bucket when it would not fill. I do not know how long I was down there. I did not count the

bucket fulls. In March while the water was being pumped out I looked after directing the work. All the work to be done was the lowering of the bucket, pulling it up and emptying it, unless there was an accident of some sort, rope break, or something of that kind. I was there looking after the work and seeing that it was done right and keeping the work agoing. In other words, acting as general superintendent for the whole. According to my recollection I spent about ten days.

Redirect examination.

By Mr. O'BRIEN:

It seems to me that I received some money from Mr. Britton for labor performed by me on the Slap Jack mine in March, 1898. According to my recollection I received $30. That is as near as I can remember.

Recross examination:

I was a co-owner at that time, but that money was sent to me, I believe, to help defray expenses, and my own expenses, and
104 my time, and whatever might come up, that is my recollection. As near as I can recollect it was paid to help me out for my time. Time I put in and so forth.

Thereupon the plaintiffs offered in evidence a grant bargain and sale deed from the Yosemite Gold Mining Company to the Yosemite Gold Mining and Milling Company, conveying the land in controversy, which deed is recorded in Vol. 44, Page 302 of deeds, dated May 30th, 1900, and admitted in evidence as plaintiffs' Exhibit "17."

Dr. F. L. ARGALL, recalled by plaintiffs, testified as follows:

Q. Doctor, in your testimony yesterday you stated that you signed two deeds to the Slap Jack mine, state whether or not you were mistaken about that?

A. Well, I am a little mistaken yesterday, although I don't know whether I signed them or not, but thinking the matter over, since, I am not sure whether I did or not.

Q. Well, what is your best judgment and recollection whether you signed more than one deed or not at that time?

A. Well, I am not positive; it might have been some other paper I got mixed up thinking it was a deed.

Q. Have you now any independent recollection of signing
105 any deed to the Slap Jack mine other than the one shown you yesterday?

A. I am not positive."

Recess till to-morrow morning, February 18th, 1902, at 10 o'clock.

F. F. BRITTON, called by plaintiffs, sworn and examined, testified as follows:

I am one of the plaintiffs in this action, and one of the owners of that so-called Slap Jack mining property in controversy. Neither Harry Argall or F. L. Argall did not, to my knowledge, pay or contribute their proportion of the assessment work done upon the Slap Jack mine for the year 1898, nor has anybody in their behalf paid their proportion of the assessment work.

By Mr. O'BRIEN:

Q. Had any of the successors in interest of the Argalls, or either of them contributed or paid such proportion of that assessment work.

Mr. STREET: I object to the question on the ground that it is irrelevant and immaterial, and it has not been shown any successors of the interest of the Argalls were ever served with any notice as required by the United States Statutes, to contribute.

106 The Court overruled the objection, to which order and ruling the defendants then and there excepted.

A. No sir, I never received a dollar.

Cross-examination:

I paid my proportion of the assessment work on the Slap Jack claim for the year 1898. I paid half. If I remember rightly, somewhere between $50 and $60. No, sir, it was not $30, nor $35. There was some of the assessment work done ourselves. I wouldn't pay myself very well. I paid Mr. Emerson money for going up the first of the year and taking the water out. My proportion of the expense of taking the water out was $35. That was the agreement Mr. Emerson and I had before he went up. I was to pay $35.00 toward the expense of taking the water out of the Slap Jack Mine in the Spring of 1898. I paid the $35.00 in two checks; one of $15.00 and the other for $20.00. That was that much to be allowed on account of the expense of taking the water out of the mine. I do not remember what other amount was paid out by me in 1898 on account of the work done upon the Slap Jack Mine for that year. I paid several bills. Mr. Emerson and I have never settled on that account. We kept our separate account, more or less. I

107 paid the $35.00 for taking the water out. There is an unsettled matter between Mr. Emerson and myself; some other work that was done. Some other travelling expenses. I paid $40.00 or $50.00 in addition to that on account of the labor or expenses connected with the Slap Jack Mine for the year 1898; to pay travelling expenses and minor details. I mean travelling expenses of Mr. Emerson and myself.

Some of it was for work on the Slap Jack Mine. That I paid out for work done in 1898, was for some work done in the latter part of the year. That was done by Mr. Boynton in December, 1898. I did not settle the bill with Mr. Boynton at that time; I settled it later. I did not pay him any money in 1898.

I agreed to pay Mr. Boynton for work done in December, 1898. I paid for the work. Of my own knowledge I do not know that Boynton did any work in 1898 upon the Slap Jack Mine for I cannot see from San Jose to Sonora. I was not at the Slap Jack Mine in December, 1898. I sent Boynton there the later part of December; the 28th or 29th. He went from Hollister to San Jose and from San Jose to Groveland. I won't be positive the day that he left San Jose. I think it was the 28th of December, 1898. I paid his travelling expenses. This was part of the $40 or $50.00 of which I spoke
I paid out for labor for the year 1898. Boynton did not do
108 $40 or $50 worth of work between the 28th of December and
the first of January, 1899. I did not pay him for his time in travelling.

Q. Then you paid him for whatever he did do, if anything, in 1898, and labor that he did after that in 1899?

A. Yes, sir.

Mr. STREET: It was for the work that Boynton did in the latter part of the year 1898, and in the year 1899, that you paid out this $40 or $50?

A. I paid more than $40 or $50 to Boynton for it.

Q. That was in what year?

A. Part of it was in 1899.

Mr. O'BRIEN: Mr. Britton, I understand you to say that you paid Mr. Boynton for the labor performed upon the Slap Jack Mine by him in the latter part of December, 1898?

A. I did.

Q. And I also understand you to say you paid him for the labor performed in January, 1899?

A. Yes, sir.

PETER BERG, called by the plaintiffs, sworn and examined, testified as follows:

I reside in San Jose, County of Santa Clara, State of California. I know the mining property involved in this lawsuit, and known as
the Slap Jack Mine. I know the Yosemite Gold Mining &
109 Milling Company. I am one of the officers of that Company.
I am a director. I was President of the Yosemite Gold Mining & Milling Company. That Company was organized May 22, 1900.

It was expressly stipulated and admitted by the parties hereto that all of the notices, deeds, proofs of labor and other records and papers introduced in evidence by the plaintiffs were properly identified as being the original records on file and of record in the office of the County Recorder of said County of Tuolumne before they were offered in evidence.

And thereupon plaintiffs rested their case.

R. S. McWHIRTER, called in behalf of the defendant, sworn and examined, testified as follows:

My name is Roscoe S. McWhirter. I am 30 years old, and a citizen of the United States. I know the mine known as the Jim Blane Mine, formerly the Slap Jack Mine. I went upon that property first on Saturday, December 31, 1898. I went with James Paul. I looked over the ground. Mr. Paul showed me the boundaries of the claim. I ascertained the different points of the claim and the monuments. I saw three easterly and three westerly monuments. I made a location upon that mine shortly after 12 o'clock of December 31st, 1898, or the morning of January 1st, 1899. Mr. Paul was with me at the time of the location. I put my notice on a tree 10 or
110 12 feet from the shaft No. 1. That was shortly after 12 o'clock. I had my watch and I heard the whistles blowing, also Giant powder for the miners were celebrating New Years; I waited a few minutes and put my notice on a tree. I went around and fixed the monuments of this claim on January 1, 1899. I arrived there about 8 o'clock the next morning. This was Sunday morning. I first went to the northeast corner stake. It was down. I put it up and built my monument. I then went to the east center stake; the stake was there, which is a post with rocks around it. I had to carry one or two rocks from a short distance away. I then went to the southeast corner stake and built my monument there. Then *Then* I went to the northwest corner stake and took the stake there and drove it down. There was a tree there blazed and I drove the stake beside the tree. On the north side of the tree. I then went to the west center stake. I built a monument around the northwest corner stake. I built my monument around the west center stake. I went to the southwest corner stake before the center. I went to the northwest corner tree and drove a stake down and put my monument there. I recognize this paper. That is my notice. This is my signature. This is a copy of the notice I posted on the
111 tree Jan. 1st, 1899. And thereupon the defendants offered in evidence the Notice of Location dated January 1st, 1899, recorded at the request of R. S. McWhirter, January 4th, 1899, at 9 o'clock A. M., in Vol. 10, Page 271, Quartz Claims, Tuolumne County Records. And thereupon the said notice was admitted in evidence and marked defendants' Exhibit "3".

Notice of Location.

Notice is hereby given that the undersigned, in compliance with the requirements of the Revised Statutes of the United States, has this day located and claimed fifteen hundred feet along the course of this lead, lode or vein, of mineral bearing quartz, and three hundred feet in width on each side of the middle of said lead, lode or vein, of mineral bearing quartz, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appertenant thereto, situate

in the Big Oak Flat Mining District, County of Tuolumne, State of California, and more particularly described as follows, to wit:

Commencing at this notice and running 600 feet in easterly direction to center post No. 1, thence 300 feet in southerly direction to corner post No. 2, thence 600 feet in a westerly direction to
112 corner post No. 3, thence 300 feet in a northerly direction to center post No. 4, thence 300 feet in a northerly direction to northwest cor. post No. 5, thence 1500 feet in an easterly direction to northeast Cor. post No. 6, thence 300 feet in a southerly direction to east center post No. 1, at place of commencement, situate at Second Garotte, near the Yosemite Road. Said mine being the same property formerly known as the Slap Jack Quartz Mining Claim, and shall be known as the Jim Blaine Mining Claim.

Located January 1st, 1899.

ROSCOE S. McWHIRTER, *Locator.*

(Attest): Gabriel Mill, Eugene M. Elwell.

Recorded at request of R. S. McWhirter, January 4th, 1899, at 9 o'clock A. M., in Vol. 10 of Quartz Mines, Page 271 of Tuolumne County Records.

R. INCH,
County Recorder.

Witness continuing: On January 1st, after putting up the notice of location I went over the mine and located the corners, etc. I went over the mine, looked it over thoroughly and saw that everything was all right. On the 1st of January I hired Mr. Elwell. I had him first sign my notice as a witness. I then had him clear away on shaft No. 3 for a windlass. Then I went back to town. I hired Mr. Elwell to stay on the premises in the building, he and his
113 family. On my way out on December 31st I hired Mr. Mills. I had him sign my notice as a witness. I hired him to go to work on Monday morning the 2nd at shaft No. 3. I returned Monday morning. Mr. Mill and Mr. Elwell were at work getting ready for the windlass, cutting some brush around the shaft. There was a good deal of brush to cut. Commencing on January 2nd, 1899, Mr. Mill worked 9 and ½ days. Mr. Elwell commenced January 1st and worked 4 days at the shaft. And in addition to that I hired him permanently to stay on the premises. I worked too. I worked some on the first. Nearly all day fixing my monuments and going over the claim. I worked on the claim off and on; not every day, but off and on several days. Walter Coyle was put in place of Mr. Elwell on January 5th, at that time Walter Coyle worked six days and a half, but a little later he worked a good many days after that. On Jan. 20th he started in and he worked until the 31st. Half a day on Sunday, the 22nd. Mr. Mill worked 9½ days at $3.00 per day, eight hours. Mr. Elwell worked 4 days at $3.00 per day. A day was lost on Jan. 10th because it was storming; also half a day on the 13th. The 8th was Sunday. I returned on Jan. 18th from Sonora. I also hired a man named Frank Prior and Tom Jones. Tom Jones worked two

days and Frank Prior worked 12½ days. I was superin-
114 tendent of the work there at that time. Outside of my superintending I worked on the windlass some. Not over three or four days. I am a practical miner. I worked on the windlass the first part of Jan. before I went away. I did not keep track myself; it must have been three or four days, though, four or five days cutting brush thereto. Clearing around the shaft. This is my proof of labor. My certificate. Thereupon there was offered in evidence and admitted the Certificate of Location dated the 17th day of January, 1899, recorded the 24th day of January, 1899, in the Recorder's Office in the County of Tuolumne, in Vol. 1, Certificates of Location, Page 17, and marked defendants' Exhibit "14".

Certificate of Location of Quartz Mining Claim.

The name of the lode or claim to which this certificate relates is the Jim Blaine, formerly the Slap Jack.

The name of the locator, R. S. McWhirter.

The said claim was discovered on the first day of January, 1899, and on said date notice was posted as provided in Section 2 of an Act of the Legislature of the State of California, entitled "An
115 Act prescribing the manner of locating claims upon the public domain of the United States, recording notices of location thereon, amending defective locations and providing for the deposit of District Records with County Recorders and prescribing the effect to be given to recordation of notices of location and affidavits," approved March 27th, 1897.

The following is a description of the said claim:

Commencing at this notice and running 600 feet in easterly direction to east center post No. 1; thence 300 feet in a southerly direction to southeast corner post No. 2; thence 1500 feet in a westerly direction to southwest corner post No. 3; thence 300 feet in a northerly direction to east center post No. 4; thence 300 feet in a northerly direction to northwest corner post No. 5; thence 1500 feet in an easterly direction to northeast corner post No. 6 thence 300 feet in a southerly direction to east center post No. 1 at place of commencement, situate at Second Garotte, Big Oak Flat Mining District, County of Tuolumne, State of California. Said claim was formerly known as the Slap Jack mining claim and shall be known as the Jim Blaine Mining Claim.

This certificate is the final or completed notice of location of the above described claim and $50.00 worth of labor in develop-
116 ment work has been done thereon since the discovery thereof, the nature of which work is as follows: Sinking of shaft on vein.

Dated January 17th, 1899.

R. S. McWHIRTER.

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

R. S. McWhirter, being first duly sworn, says: That he has heard read the foregoing certificate and knows the contents thereof; that

the same is true of his own knowledge; that he makes this verification on behalf of R. S. McWhirter, the locator named in said certificate.

R. S. McWHIRTER.

Subscribed and sworn to January 17, 1899.

[NOTARIAL SEAL.] F. MURROW,
Notary Public.

Filed for record at the request of R. S. McWhirter, January 24, A. D., 1899, at 9 o'clock A. M., in Vol. 1 of Certificates of Location of Quartz Mining Claims, at page 17, Tuolumne County Records.

R. INCH,
County Recorder.

United States Documentary Stamps, 2 of $.05 cancelled. F. M. 1-17, 1899.

I was on the Slap Jack mine about 2 o'clock December 31,
117 1898. I went over the premises and did not see any one there. I did not see any one at work at that time. I did not see any evidence of any work being done, or having been done upon the premises at that time. I was there also on the morning of Sunday, January 1st. I was alone at that time. Shortly afterwards I met Elwell. He was living on the premises with his family. I did not see this witness Boynton during that day on the mining property. I did not see him there on the 31st. I did not see anybody on the premises on December 31st. There was no one at work on the premises other than myself and Mr. Elwell on January 1st, 1899. After January 1st, 1899, I saw Mr. Boynton, Mr. Britton and Mr. Emerson at work on the Slap Jack claim. They were at work in the cut, along or near the ledge. They were not down to the ledge. They were working in loamy soil. I am a practical miner.

Q. Do you know, Mr. McWhirter, how much work these gentlemen did upon that claim after January 1st, 1899, and where they did the work upon that claim?

A. I know about up to—let me see—April, I believe it was.

Q. Where did they work upon that claim?

A. Along in this cut.

Q. Was there any other work that they did on that claim
118 during that period from January 1st, 1899, to April in that year?

A. There was some, cutting brush, yes.

Q. Now, Mr. McWhirter, I will ask you, what was the reasonable value of that work in that open cut? What would it be reasonably worth as a practical miner to perform that work?

A. Well, I think I could do it for $45—$40 or $45, $50, somewhere along there; not over $50.

Q. You say there was some brush cut upon this claim?

A. Yes, sir.

Q. Who cut that brush?

A. Mr. Boynton.

Q. Do you know when he commenced cutting brush?

A. I think he was cutting brush on the 2nd day of January, started in Monday, when I first saw him.

Q. Was there any brush cut on that claim prior to January 2, 1899, on that claim by Mr. Boynton?

A. No, sir, not to my knowledge.

Q. Well, if there had been any brush cut on that claim, and I call your attention particularly to the northeast corner of the claim, if there had been any brush cut on that claim would you have known it, prior to January 1st?

A. Yes, sir, I would have known it.

119 Cross-examination of R. S. McWHIRTER:

I have been in Tuolumne County since the 28th of last July (1898). I arrived in Groveland on the 31st day of December, 1898. Never there before that day. Never on the Slap Jack mine before that day. I put the notice on a little after 12 o'clock at night. Put it on a tree about 12 feet north of the shaft. A pine tree. Mr. Paul was with me. He was about two feet distant from me when I posted the notice. I built a monument at the southeast corner. Rocks around a stake. It was a picket stake. I drove it down with a chunk of wood. I put the stake where the old monument was. In the center of the monument. I built up the old monument, it had fallen. I next went to the southwest corner. I drove a stake by the side of a tree. Drove down a small picket stake with a rock. Put that corner on the north side of a tree. Tree with a blaze. Paul told me the day before that that was a corner. He said he was acquainted with the corners. I followed his directions. I do not know if that is 1500 feet from the southeast corner or not. Just stepped it. Do not know whether Paul stepped it or not. On west center I found stake and a monument, did not destroy it. Built rocks around it and marked it. The ground is very steep at that point. Rocks will stand there
120 if put in the shape of a monument. At northwest corner I drove a stake and built a monument. I did not see one there already. On the corner there was a tree blazed. Had no marks on it. It said something like the northwest corner. It was blazed so I could hardly read it. I went round the corners Sunday, Jan. 1, 1899. I don't know when I got through. I know I was late for lunch. Lunch at the Hotel Groveland. That is a mile and three-fourths or two miles from the Slap Jack. I was alone going around corners. These marks were the corners of the Slap Jack mine. I went away from there Jan. 4. Arrived again on the 15th. I reside in San Francisco. Had not been on the ground between the 4th and 15th. Arrived about noon, on the stage. Went to the mine about three o'clock. I don't know what I did there on the 15th. Don't remember anything about the 15th. The 10th was storming.

Q. When you went there on the 31st did you see any one there in the afternoon?

A. No, sir; nobody.

Did not hold conversation with anybody there. First saw Mr. Boynton on the 2nd. Only saw Mr. Elwell at the house on Sunday. After going round boundaries went to shaft No. 1 and 2. On the 31st of December went around the corners and did not see anyone working. I would have seen them had they been there.

121 I think so. I was all over the ground.

Q. You was all over the location then?

A. Great portion of it. There is a portion there I would not want to go over.

Q. Seeing these monuments you spoke of there and having them pointed out to you as the corners of the Slap Jack mine, how did you know this mining ground was open to location?

A. Well, Mr. Paul had told me and I heard before I went down there.

I enquired about it and found out it was jumpable. I was looking for such property.

I thought of bonding the Dewey. I thought of jumping this mine first. I think, counting all after January 1st, I did 5, 6 or 8 days' work. I did not work all day. I was lending a hand and superintending. Not doing regular work. Elwell occupied three rooms of the house. I employed him to stay there and paid him for it. On January 1st I was on the Jim Blaine mine. I arrived on the Jim Blaine mine some place near 11 o'clock on the night of the 31st and stayed till 1:30. Got my breakfast in Groveland a little before 7. Walter Coyle worked for me in all 17 days. Elwell 4 days. Outside of the labor I spent $6 or $7 for powder, fuse and caps. Used candles down shaft, being about 35 feet—No. 2 shaft. There was a windlass used there. Walter Coyle got it somewhere. I am

122 friendly with Mr. Emerson. Mr. Britton and I are not lovers. Not friendly in any way. On speaking terms if he looks my way. I bear some ill will towards him, I have a right to. I do not usually speak to a man I bear ill will to. Mr. Boynton offered objections to my working there. He objected to my putting my notice on the tree. My notice of labor on the 17th of January. No one was there at midnight to object. No one there but Paul and me. Emerson and Mr. Britton made objections. They came to shaft No. 2 on the 23rd. Mr. Emerson objected to me working there. Mr. Emerson said he had come to notify me to cease work and abondon the premises. I told him I had located, and that they were my premises, and I intended to stay there. Mr. Britton was very angry.

When I attempted to locate the claim known as the Jim Blaine mine I was attempting to jump, or re-locate the Slap Jack mine.

The ground embraced within the exterior boundaries of the Jim Blaine mine was the same ground included within the exterior boundaries of the Slap Jack mine. When I was on the ground on Dec. 31st, 1898, I knew the boundaries of the Slap Jack mine. They were pointed out to me by Mr. Paul on December 31st, 1898. That was the first time I had been upon the ground.

Q. How did you happen to go there?

123 A. Well, I was sent there.

Q. By whom?

A. It was through Mr. Beggs I was sent there.
Q. For what purpose were you sent there?
A. To re-locate that property.
Q. By whom were the expenses incurred in making that re-location paid?
A. Well, they were incurred indirectly through Mr. Beggs.

I arrived at the mine at 11 o'clock at night on December 31st, 1898, and remained until about 2 o'clock in the morning of Jan. 1st, 1899. Then I went back to Groveland and returned to the mine about 8 o'clock in the morning.

"I didn't remain continually at the mine from January 1st to January 20th. I cannot tell now what part of the time I was not there. It is a fact that during the early part of January, 1899, I was away from the claim a portion of the time.

The cut about which I testified is about 20 or 30 feet long, I should judge about 6 or 7 feet deep and probably 6 or 7 feet wide. It is in loamy soil. The country rock there is slate and granite, I believe, if I remember right. The cut was near the vein. It was a little nearer the foot wall of the vein. There was no ledge there.

Q. Now, you say, during a part of the time in January
124 when you were there, you saw Mr. Britton and Mr. Boynton work- there, didn't you?
A. During part of January, yes.
Q. This open cut, I understood you to say, was run by them?
A. Yes, I think it was run by them, Mr. Boynton and Mr Britton.
Q. Mr. Boynton was there before Mr. Britton came, the first part of the work?
A. I believe he was; on the 2nd day of January I saw Mr. Boynton.
Q. What work was he doing there then?
A. He was cutting bush.
Q. Mr. McWhirter, did you ever run an open cut of the dimensions of that open cut upon this ground and about which you have testified in similar ground?
A. Well, not exactly, but I have worked in loamy soil a good deal that way; it was not hard soil, of course you had to use a pick.
Q. It was picking ground?
A. Yes, sir.
Q. Then I understand you to say you never run across in your mining experience, run or dug an open cut in similar soil, of these dimensions?
A. No, sir, I couldn't say that I have.
Q. Did you make any test or examination of the ground to determine about what it would be worth?

A. Well, I did kind of size the cut up there.
125 Q. And simply give it an off-hand opinion?
A. Yes, sir.
Q. That is the idea, is it not, Mr. McWhirter?
A. That is the idea.

Q. You say there was no brush cut prior to January 1st, 1899, upon the Slap Jack mine?

A. No, sir, I think not. I know I didn't see any signs of any brush being cut there.

Q. December 31st was the first time you had been upon the ground?

A. Yes, sir.

Q. What part of the day were you there?

A. In the afternoon.

Q. I understood you to say in your former testimony that you did not go over all of the claim on that day?

A. Well, there was a portion of it, places very brushy. I didn't go down on my hands and knees and crawl in, I wouldn't care to go into.

Q. There is quite a thick growth of underbrush on the claim?

A. Yes, small bunches.

Q. There were bunches of willows growing there, were there not?

A. Yes, sir.

Q. And they are quite high?

A. Yes, sir.

I saw Mr. Boynton Jan. 2nd, 1899; he was cutting brush.

126 December 31st was the first time I had been upon this mine. I arrived there about 2 o'clock and remained there a couple of hours, probably between 2 and 5, along there. I do not remember how many days Mr. Boynton worked cutting brush in January. I do not know how many days Mr. Britton worked there during the month of January.

Redirect examination:

The willows growing on the Slap Jack claim are on the eastern part. There are no willows growing on the westerly end of the claim. The dense brush is on the westerly end. The willows on the east end are scattered. I could readily walk round among them. On Saturday, December 31st and January 1st I was over the greater portion, all round the boundaries; on the east end of the claim you can readily see by going down to these willows, the east end is clear. On December 31st, 1898, I went over both ends about the same. I went over the claim again on Sunday. I did not notice any willows being cut on Sunday, January 1st. If there had been any willows cut upon the Slap Jack mine prior to Jan. 1st, and particularly the easterly end I would have seen them.

127 Cross-examination:

"Q. Mr. McWhirter, did you make any examination about the willows being cut when you were there on January 1st?

A. Well, I was pretty well over the property; if there had been any willows cut lately I would have seen them.

Q. Is it not a fact on January 1st you were around putting up monuments?

A. On January 1st, yes.

Q. And most of your time and attention was devoted to that?

A. Yes, January 1st, most of my time and attention was towards the monuments.

Q. And in perfecting your location?

A. Yes, sir.

Q. Mr. McWhirter, where did you work as a miner before, immediately prior to January 1st, 1899?

A. I worked prior to that, I worked over here at Columbia.

Q. At what mine?

A. On the Concord.

Q. What kind of a mine is it?

A. It is a gravel mine.

Q. How long did you work there?

128 A. Worked there five months, I believe it was.

Q. What kind of work did you do there?

A. Five months and a half it was sinking a shaft, I was down in the hole.

Q. Mining work?

A. Yes, sir.

Q. At what mine did you work before that?

A. Well, I was prospecting all around most of the time.

Q. Well, how long did you engage in prospecting for yourself?

A. Well, off and on, I guess a year and a half.

Q. Well, prior to that time, what mine did you work at?

A. I did not work at any prior to that.

Q. So all your mining experience consists of the year and a half you were prospecting for yourself and five months and a half you worked at the gravel mine over near Columbia, I mean prior to January 1st.

A. Well, I figured out three years altogether I worked at it.

Q. Well, did you have any mining experience prior to January 1st, 1899, excepting what you have now testified to?

A. No, sir.

Q. Did you do any prospecting over in the neighborhood of the Slap Jack mine?

A. Yes, sir.

129 Q. How long did you prospect there?

A. Well, I don't remember how long.

Q. Three months, six months?

A. I couldn't say.

Q. Was it more than three months?

A. No, sir.

Q. And outside of that three months you had no experience mining the neighborhood of the Slap Jack mine, had you?

A. No, sir.

Q. All the rest of your experience has been in other places?

A. Yes, sir.

Q. Than in the neighborhood of the Slap Jack mine?

A. Yes, sir.

Q. Mr. McWhirter, you testified in your cross examination that you were sent up to jump the Slap Jack mine by Mr. Beggs. Is that Will M. Beggs, the attorney in this case?

A. No, sir. I was sent through him; sent by another party.
Q. But through him?
A. Yes, sir.

MARY A. ELWELL, called by the defendants, sworn and examined, testified as follows:

130 I am the wife of E. M. Elwell. I reside above Groveland about 25 or 30 miles. In 1898, in the fall of the year, I was living in a house on the Slap Jack mine. I went there on Sept. 15th. My family consists of myself, my husband and a little boy about 6 weeks old. We remained there pretty nearly a year. We left there on August 22nd, 1899. On Dec. 31, 1898, I was down at Walter Coyle's I remember the day of the week, it was Saturday. I was there before noon and afternoon. I returned to my house on the Slap Jack mine about 3 o'clock. The distance from Walter Coyle's house to my house on the Slap Jack mine is about a quarter of a mile. I met Mrs. Coyle at her house.

Q. State if you saw any person go to the Slap Jack mine on the afternoon of that day?

A. Yes, sir.

Q. Do you recognize that as being the gentleman, with the whiskers there?

A. Yes, sir.

Q. Is that the gentleman? (Referring to Mr. Boynton).

A. Yes, that looks like the man I saw there.

I saw him going to the Slap Jack mine between 2 and 3 o'clock in the afternoon. There was another man brought him up in a buggy. He passed by along in front of the house.

131 This was in the afternoon somewhere in the neighborhood of 2 or half-past 2. After I saw Mr. Boynton pass by the house on the Slap Jack mine I went home shortly afterwards. Mrs. Coyle went with me. We went from the Coyle house to my house on the mine. Between the time Mr. Boynton went to the Slap Jack mine and my arrival at the house, the buggy which brought Mr. Boynton had returned. I arrived at the house on the mine about 3 o'clock. Mrs. Coyle was with me. I saw Mr. Boynton there. He occupied one of the rooms in the house. When I first saw him he was out gathering up wood to burn in the fireplace, just dead wood. He packed it into the house. Afterwards I saw him getting water and wood and pine needles for his bed. I could hear him moving around in that room where he was from the room occupied by myself and Mrs. Coyle. There was no one else upon the premises besides Mrs. Coyle, myself and Mr. Boynton. It took Mr. Boynton until pretty nearly dark to get his wood and gather up these pine needles and in getting his water. At that season of the year and on that day the weather was cloudy. It begins to get dark pretty early on December 31st, and he was occupied until it got dark in gathering this material for fire and getting the water. During all this time Mrs. Coyle was in my room. Mrs. Coyle

went away about 4 o'clock. At that time of day and on that
132 day it was getting dark at that time. On that day and up till 4 o'clock I heard him out round and in the house. The flooring was made of rough boards and people walking around can be easily heard. He was there in the house or about the house preparing for his meal and bed all the time during that afternoon. This is the first time that Boynton came to that house. He was not there the day before.

Cross-examination:

December 31st was the first time I saw Mr. Boynton. He came and occupied the house on the Slap Jack mine. The same house that I was occupying. Somebody accompanied him or drove him there I couldn't tell you what kind of a wagon or buggy they came in. I can't say whether it was a single rig or a double rig. I don't know whether he brought any mining tools with him.

I was not acquainted with the party. I was not close enough to see who it was that drove him.

When I first saw them going to the house I was at Mrs. Coyle's. She is my nearest neighbor.

Q. You visited Mrs. Coyle frequently?

A. Yes, sir.

Q. Did you visit Mrs. Coyle on any other day of the week?

A. I guess I did.

133 Q. Have you any recollection now of any particular day of the week you did visit her?

A. No, sir, only that day.

Q. You remember visiting her that day?

A. Yes, sir.

Q. What was the first thing you did after you came home that day to your house?

A. Made a fire.

Q. Then what was the next thing you did?

A. We sat down and chatted.

Q. Can you tell us now the conversation that took place between you and Mrs. Coyle then?

A. No, sir.

Q. Can you relate any conversation that took place between you and Mrs. Coyle at that time?

A. No, sir.

Q. Mrs. Coyle had frequently been in your hous- at other times?

A. Yes, sir.

Q. Before that?

A. Yes, sir.

Q. Had she been in your house that week?

A. I couldn't tell you. I don't know whether she had or not I don't remember.

Mrs. Coyle left our house about 4 o'clock. I looked at the clock to see what time it was. We arrived at the house about 3 o'clock.

134 The reason that I fix the time Dec. 31st, 1898, that Mr. Boynton came to the Slap Jack mine and at no other day is this: My husband was working at Second Garotte mine and

expected to finish the last day of the year; he came home and brought all of his tools, I remember it on that account. Another reason is this: While we were talking at our house I remarked what a nice day New Year day would be. I cannot recall any other fact or circumstance to relate. I remember that it was the last day of the year, and the last day of the week that Mr. Boynton came to the Slap Jack mine, that left an impression on my mind.

Q. Other men had been to the Slap Jack mine at other times?

A. Yes, sir.

Q. You say you didn't pay any particular attention to the person who conveyed Mr. Boynton?

A. No, sir.

Q. Some one brought him there and left him at the mine and then returned?

A. Yes, sir.

Q. And that party was driving a team?

A. Yes, sir.

Q. Can you tell the color of the horses?

A. No, sir.

Q. Do you know whether it was a covered wagon or not?

A. No, sir.

135 Q. Do you know whether it was a buggy or a wagon.

A. It was a wagon.

Q. What kind of a wagon?

A. I can't say.

Mr. Boynton remained at the house that night. He remained there after that. I couldn't say for how long. I did not have any conversation with him that night. Mr. Boynton was occupied in getting wood, water and pine needles from the time he came there on Dec. 31st till dark. We sat right by the window. He was passing back and forwards and I could not help but see him. I did not count the number of buckets he hauled, nor how much wood he brought in, nor the quantity of pine needles.

Redirect examination:

The first that I noticed was a team going by the Coyle house towards the Slap Jack mine with a couple of men and a wagon. The wagon had returned before we went to the house. About half an hour after the wagon went away we started up to the mine.

136 Mrs. ROSA M. COYLE, called by defendants, sworn and examined, testified as follows:

I am the wife of Walter J. Coyle. In December, 1898, I was living at my home in Second Garotte about a fourth of a mile from the Slap Jack mine. I know Mrs. Elwell. She was at my house on December 31st, 1898, on the afternoon of that day. I noticed a wagon with two men pass my house on the road going towards the Slap Jack mine.

Q. Was one of those men you saw in the wagon this gentleman here?—You will please stand up Mr. Boynton.

A. I couldn't say for sure. I think he was the man I saw afterwards.

This was between 2 and 3 o'clock in the afternoon. Mrs. Elwell was with me at my house at that time. I left my house in company with Mrs. Elwell and went to the Slap Jack house. At that time the wagon which I had seen going to the mine had returned. It had returned before we started. Mrs. Elwell and I arrived at the Slap Jack house between 3 and 4 o'clock. Mr. Boynton was outside the house at the time of our arrival. He was packing some fire wood. I saw
137 him bringing a bucket of water from the spring. He took the wood around to the house. I do not know whether he took it in or not. I could hear him when he walked on the floor of the room that he occupied from where Mrs. Elwell and myself were. The day was kind of windy and cloudy. No one was in the house except Mr. Boynton, Mrs. Elwell and myself. During all of that time Mr. Boynton was in and about the house. I returned to my home a little after 4 o'clock. It was becoming dark soon after I got home. This is about one-fourth of a mile from my house. At that time I was getting water from the Slap Jack mine for my house. I was personally employed in getting the water. That is I got it myself. The water had given out at our house; the well was dry. Had Mr. Boynton been at the mine before that day I don't know that I wouldn't have seen him.

Cross-examination:

I have been living at Second Garotte six years. Mrs. Elwell is my sister-in-law. We were close neighbors. We visited frequently during December, 1898. We got our drinking water at the Slap Jack mine at that time. I went there daily for the water when my husband was not at home. He was not at home December 31, 1898. He was working at Big Oak Flat.

Q. Do you remember whether he was home on the 30th
138 of December, 1898?

A. I don't think he was.

Q. Have you any independent recollection now whether he was or was not?

A. I couldn't say for sure whether he was or was not.

He had been home for Christmas and went back to the Flat. I remember distinctly that he was not at home on the 31st. Mrs. Elwell during the last part of December was in the habit of visiting us frequently. And I visited her frequently. It was on December 31st that I saw Mr. Boynton and some one driving to the Slap Jack Mine. I do not know who the other party was. I did not pay any special attention to these parties. When we got up to the house we saw Mr. Boynton there. He got the wood near the barn.

One of the circumstances that impressed my mind about Mr. Boynton going to the Slap Jack mine and enables me to remember and testify positively it was December 31st, 1898, is that it was the last day of the year and the fact that it looked stormy. I said to my sister-in-law, "I hope this will be the last water I will have to pack" and the next day it stormed. It did not storm during December, 1898, except that day. It stormed the 1st day of the year.

I cannot be mistaken that it was December 31 that Mr.
139 Boynton came to the mine. Another circumstance that impresses it upon my mind is that a gentleman came there to board on the first day of the year, the first day after Mr. Boynton came. Another circumstance is that I remember hearing them say that the Slap Jack mine was jumped that night.

Q. Have you talked with your sister-in-law about these matters recently?

A. Well, we kind of spoke about it since we have been here.

Q. Since you have been in attendance on Court?

A. Yes, sir.

WALTER J. COYLE, called by the defendants, sworn and examined, testified as follows:

I assisted Mr. Emerson in taking the water out of the Slap Jack mine in March, 1898. At the time Mr. Emerson went away he told George Smith if the expert came there he would like to have him get the water out for him so that he could go down in the mine. I was there. There was no pumping done after Mr. Emerson left the mine. I was to help him. The expert came three or four days after Mr. Emerson left. We did not pump the water out. He said he did not care about going down in the mine. I saw the expert go
140 by with the rock, samples. He was there over half an hour. I am an expert miner. I have been engaged in mining over 20 years, in both quartz and placer mining; worked in shafts, etc. I am accustomed to taking water out of shafts.

Q. Now, what was it worth in 1898 to take water out of that shaft, pump the water out and put it in a condition so a man could work in the bottom of it at that time?

A. Well, if everything was all ready, why then the water could be taken out of there for $25 or $30.

Q. If everything was all ready?

A. Yes, sir.

Q. That is it could be taken out for $25 or $30?

A. Yes, sir.

Q. Now what was required at that time to put that mine and hoist in condition to be ready to take the water out?

A. Well, had to put in sheaves, a new sheave put in order to work there.

Q. Now, what was it worth in 1898 to take the water out of that shaft, pump the water out and put it in a condition so a man could work in the bottom of it at that time?

A. Well, if every thing was all ready, why I think the water could be taken out of there for $25 or $30.

141 In order to get things ready it was necessary to put in a new sheave. I do not remember exactly how long we were at it in putting that in. I think we worked half a day at that. Mr. Emerson, Phil Sheridan and I worked at it. We had to put in blocks and ropes. This took us altogether about a day to get ready. After we got ready we were actually engaged in taking the water out of the shaft two or three days. Two men on a shift there while working

until we got down to the bottom. One drove the team and the other dumped the bucket. In my estimate $25 or $30. It includes taking the water out. When it got so low somebody would have to go down the shaft and fill the bucket. That is a fair and reasonable price for taking the water out of the shaft. I would take it out for that if everything was all ready to do the work. Two men at $3.00 using a team of horses would take the water up to the time when it would require a man to go down and fill the bucket, then it would require an extra man for about a half a day. I got $3.00 a day. $3.00 a day was paid to the man dumping the bucket.

Q. Oh, how many days were the men all told there engaged in pumping the water out of the shaft and keeping it out waiting for the expert?

A. I think I worked there six days or six days and a half; something like that.

142 Emerson was bossing the job during the time we were taking the water out of the shaft. He made a trip to town once and awhile for something. He was around there most of the time. He went down in the mine one day when we got the water out.

Q. Did he do any actual, physical work, by either dumping the bucket or driving the horse, anything of that sort?

A. Not that I remember of.

Q. If he had you would have remembered it?

A. Well, he helped put the sheave up.

Cross-examination:

I have been engaged in the mining business 20 years. Mining in Tuolumne and Calaveras Counties. I assisted in unwatering the Slap Jack mine in 1898. I was paid something like $21 for the labor performed by me. We worked 12 hours. Fred Smith, Phil Sheridan and myself were employed on a shift at that time. I think Sheridan was employed 4 or 5 days, and Gabe Mill 2 or 3 days.

Q. How many men were there altogether?

A. Five men altogether and Mr. Emerson.

Q. How many shifts did they work; did you work two shifts?

A. One night and one day.

Q. Two shifts then?

A. Run night and day.

143 Q. While the mine was being unwatered, the work was conducted continuously day and night?

A. Yes, sir.

Q. As you say, there was 5 men there engaged in doing the work?

A. That is with Mr. Emerson.

Q. Mr. Emerson made 5?

A. Yes, sir.

Q What were the names of the men?

A. Fred Smith, Gabe Mills, Phil Sheridan and myself.

Q. Do you know how many days Gabe Mills worked?

A. I could not tell exactly.

Q. Do you know how many days Charley Smith worked?

A. No, sir.

Q. Do you know how many days Fred Smith worked?
A. No, I can't tell to a day.
Q. Do you know how many days Sheridan worked?
A. No, I can't tell exactly.
Q. Now, all of these men were employed there, were they not?
A. Yes, sir.
Q. In unwatering the mine?
A. Yes, sir.
144 Q. And they were all employed there for some days?
A. They were all there for a few days, yes.
Q. You don't remember just how many days they were there, as I understand you, Mr. Coyle?
A. No, sir.
Q. These men did practically the same kind of work you did?
A. Yes, sir.
Q. And earned the same amount you did, didn't they?
A. I don't know what they got; I got $3.00 a day.
Q. They were engaged in doing the same kind of work?
A. The same kind of work, yes.
Q. Mr. Coyle, how are you able then to say that the reasonable value of the labor unwatering the mine would be $25 or $30, when you were paid yourself $21.00, and it took a number of other men to assist you in unwatering it?
A. Well, it took quite a while to get ready and they lost time at the last, letting the mine fill up for half a day; then go to work again and take it out, keep it down that way awhile; I would like to get $30 to take the water out.
Q. The work that was actually done there was more than $25 or $30.
A. Yes, sir.
145 Q. Don't you know it was?
A. Yes, getting ready, getting sheaves, buckets and ropes.
Q. Is it not a fact the work done by them in the way they did it was worth more than $25 or $30?
A. I think so, the way it was done.
Q. Mr. Emerson was there during the time the mine was being unwatered?
A. Yes, sir.
Q. And you say he was bossing the job?
A. Yes, sir.
Q. There was some labor in having the sheaves changed, was there not?
A. Yes, sir.
Q. And I understand that you and Mr. Emerson attended to that?
A. Yes, sir.
Q. And some other man too?
A. Sheridan.
Q. You and Sheridan and Emerson labored in putting that sheave up and in getting it in condition?
A. Yes, sir.

Q. What other work were you engaged in there besides the work of taking the water out; I mean preparatory work?

A. We built a flume, built a spout to carry the water away from the shaft.

146 Q. You had a team there used for the purpose — hauling up the bucket?

A. Yes, sir.

Q. How many horses?

A. Two horses.

Q. And how long was the team used?

A. Well, we kept the team there while we were getting the water out.

Q. How many days was the team actually used in getting the water out?

A. I couldn't tell exactly to a day, but I think about five days.

Q. Now, two teams, weren't there a day team and a team by night?

A. Yes, sir.

Q. And used both at the same time?

A. Well, they had a team for day and a team for night.

Q. Two horses in each team?

A. Yes, sir.

Q. And the night team worked as long as the day team?

A. Yes, sir.

Q. And the teams were necessary for the purpose of getting the water out?

A. Yes, sir.

147 Redirect examination:

Q. Mr. Coyle, I understand you to say that you pumped the water, got the water out of the mine and Mr. Emerson let it fill again?

A. Well, pumped it out again, that is towards the last, waiting for the expert to come, and he let it fill up half a day, you know. The water came in pretty slow and no use keeping a team there all day, and men, just to pull the water out again.

Q. Were you paid for the time you were waiting for the mine to fill up?

A. I didn't get any pay when I wasn't doing anything, no.

Q. Well, if the mine filled up for half a day, that shift didn't count?

A. Not that shift, no.

Q. Well, more than once you let the water——

A. After we got the water down, then all we done was to just hold it there.

Q. You simply held it there?

A. Yes, sir.

Recross-examination:

"Q. Mr. Coyle, is it not a fact that after you had un-

148 watered the mine, that then it was simply a matter of keeping the water out, and you were engaged for a couple of days in the work of keeping the water down?

A. Yes, keeping the water down, let it fill up half a day and pump it out.

Q. Wouldn't take long to pump it out?

A. Bailed it out with a bucket.

Q. After the mine had been unwatered the work was not very much to keep it unwatered?

A. No, the water didn't come in very fast.

HARRY ARGALL, called by the defendants, sworn and examined, testified as follows:

I knew Gabe Mill in his lifetime. He was a witness at the last trial of this case. He is dead. I helped to bury him. He died about two years ago. I helped dress him, to put him in the coffin and bury him. This was at Groveland. I saw him buried. I helped drop him in the hole, and fill up the grave.

E. M. ELWELL called by the defendants, sworn and examined testified as follows:

149 *Stipulation.*

It is hereby stipulated that the testimony given at the former trial of this case by the witness E. M. Elwell will be admitted in evidence and considered read under the same form of stipulation as to the testimony of the witness R. S. McWhirter; the testimony of E. M. Elwell as found in the transcript of the reporter's notes of the testimony of the former trial of the case on file in this action, commencing on page 128 and ending on page 141; and all objections and exceptions are withdrawn, plaintiff reserving the right to move to strike the whole of said testimony or any part thereof out at any time before the argument of the cause. On the foregoing stipulation the testimony is received in evidence and considered read.

My name is E. M. Elwell. I live at Second Garotte. Lived there for five months since the 5th of August. I moved to the Slap Jack mine about the 16th day of September, last year. I am still living there. I know R. S. McWhirter. I remember him about the 1st day of January 1899. He employed me to do some work. On Sunday, January 1st, 1899. On that day I brushed a trail up to the quartz lead and cleared around the shaft. I can't tell what
150 time he got there that morning. I went down and signed the notice of location about 7 or 8 o'clock in the morning. Signed the notice in that box. I know a man named Boynton around there. He stopped at the Slap Jack house. Same house I lived in. Saw him first the night of Dec. 31st. I went to work for McWhirter Sunday, 1st, getting shaft ready. Cut brush around shaft. I cleaned around the shaft and got ready to put a windlass on. He told me to get the windlass up. Went to work the next day. Gabe Mills worked with me. Hoisted dirt out of shaft. Gabe worked in shaft. I worked for McWhirter the 1st, 3d and 4th. I put Walter Coyle in my place and went to work for another man.

I received from McWhirter for my work $12.00. Was not otherwise employed by McWhirter. He hired me to look out for the mine. For that he paid me $10.00. I think Boynton commenced work about the 3rd of January. Cutting brush. Mr. Boynton came there December 31, 1898. I don't know at what time he came. I don't know if he did any work. I was not there. I got home about 7 o'clock on the evening of the 31st. I was there in October when Mr. Emerson and Britton were there. I know a hole that has been designated as the barbecue hole. I don't know how much work they did in that hole. I saw it after their work.
151 I am a practical miner. I could do what they did in about fifteen minutes. I do not know whether these parties did the work or not. The sides were scraped down and the bottom shoveled out. Somebody made pick marks down the sides of the shaft and throwed the bottom out. I don't know who done it. It would take a practical miner to do that work about fifteen minutes.

Cross-examination of E. M. ELWELL:

I went on Slap Jack September 15th. I was living there all the time. The balance of the year. In the house there. I cut brush and did a little clearing round during the first four days I worked there. Worked on windlass afterward. Gabe Mills and I worked together there. Mr. McWhirter worked on the windlass sometimes. I saw Mr. McWhirter first on the mine on the first day of January. He came there first at 9 or 10 o'clock at night. The first time he came I heard the dog bark, and the second time I saw somebody. I don't know who it was. The first time I saw him to know him was on the first. Did not know him before that. Did not see him post a notice. I saw him down at the tree, did not know what he was doing. It was a dark night. No moonlight. I could see an object there, knew that somebody was there. I knew the
152 next morning what was there. I saw the notice posted in a box nailed to a tree. About four feet from the ground. No cover projecting. The box was about six inches deep. A foot long and ten inches wide. Box put up and down with the tree. I signed that notice about 8 o'clock. Notice was tacked in box, six tacks in notice. Had a talk with him about locating before I signed the notice. That was the first time I saw him or ever met him. I never examined the barbecue hole at all. I have seen it off and on, but never examined it. The hole is there just the same as it was two years ago. I saw that somebody had scraped the sides down. Seen somebody had cleaned it out. Been there 1,000 times. Passed back and forth to get water. I know James Paul. He is a practical miner. I do not think it would take him over fifteen minutes. I think I could do it in that time. I first saw Mr. Boynton about 7 o'clock in the afternoon of the 31st of December. About 7 o'clock, I think. On the 31st I saw him about the premises. Wasn't doing anything. He was walking around, sitting down, something of that kind. No, I did not see any wagon come there with him. Saw no tools, no mining tools, no ax. I wouldn't have seen them. I was not there. I was not there on the 30th. I have

lived there right along since Jan. 1st. I was there nights,
153 not days. I get home about 6 or 7 o'clock. Did not see any tools there. Was there when Mr. Britton and Emerson were there. Saw them at work. It was in January, 1899. I did not see them at the barbecue hole. I think Boynton commenced work on the 3d of January. I think that is the date. I don't know whether he worked on the 2nd or not. I am satisfied he didn't work on the 1st. Because I was there all day, and did not see him work any place. I am satisfied that he did not work on the 1st. That was Sunday. Did not see him work on December 31st. I don't know anything about his work at all. I was around there all day Sunday. Around the house, I might have been 100 yards from the house. I saw no one working on the flat. I went down to Coyle's and when I came back there was no one working there.

Redirect examination of E. M. ELWELL:

(Hands witness a paper.) I think I saw that paper or one similar to it. I seen a paper posted on the door of the Slap Jack house on the east end of the house. Yes, I guess it is the same notice. I found a notice in the coffee mill. I have it. Here it is. Found it about a week after it was dated. After these people left here. I saw
154 the one on the house about a week after it was posted. They left about a week before that. I was away that time about a week. When I left that notice was not posted or in the coffee mill. When I came back I found them. I can't tell the date when I came back. I saw someone putting up the notice on the tree shortly after midnight of the 31st of December. On Sunday I went down and witnessed it. I went to work that day for McWhirter. The next day Mr. Mills went to work. On the shaft. The windlass was brought there. On the 31st of December, 1898, the last day of the year I was working at the Rhode Island mine finishing up assessment work. I finished up the work on that day and returned home about 7 o'clock. I was living on the Slap Jack mine at that time. During the entire month of Dec. I am acquainted with the man named Boynton. He was a witness at the former trial. I saw him on the evening of Dec. 31, 1899. I was on the Slap Jack mine on the first of Jan., 1899. On that day McWhirter came there in the morning. I went out with him and went around the mine, and he put me to do a little work around there fixing around the shaft. I went over the Slap Jack mine with McWhirter. I was over the easterly end and to the northeasterly corner of the Slap Jack mine on the 1st of January. I passed there two or three times. The ground is nearly level, a little sloping. There is a very little brush, some willow brush along the creek. I was over the easterly
155 end of the mine on the first of January, 1899 with McWhirter and did not observe that any brush had been cut in that vicinity. No sign of any brush having been cut at all. After Jan. 1st Mr. Boynton cut brush in that locality right along side the road. This was just a little west of the northeast corner. I knew where the corners of the Slap Jack mine were on Jan. 1. I was on the easterly end of the claim between 10 and 11 o'clock some time in the

forenoon. If there had been any willows cut I would have seen them. I was going up and down by there and I could not help seeing it if there had been any cut. I returned home from the Rhode Island mine that evening. I was home on the Slap Jack mine on the night of the 30th.

Q. While you were at work at the Rhode Island mine in Groveland you returned home each night?

A. Yes, sir.

Q. Were you at home the night of the 30th?

A. Yes, sir.

Q. Did you or didn't you see Boynton at the Slap Jack mine the night of the 30th?

A. No, sir.

Q. Or at your house?

A. No, sir.

Q. On the night of the 31st you say you saw Mr. Boynton there?

156 A. Yes, sir.

Q. Where was he?

A. He was around in his room at the northeast end of the house. He was there on the night of the 31st. He was around in his room at the northeast end of the house. There are six or seven rooms in this house. This room joins one of our rooms. If he had been there the night of the 30th I would have been likely to have seen him or know it. He was not there on the night of the 30th. I got home about 6 o'clock on the 30th. On the night of the 31st I brought my tools home.

Cross-examination of E. M. ELWELL:

I was living on the Slap Jack mine the last day of December, 1898. Also in January, 1899. I continued to occupy the house. On January 1st, 1899, I went to work for McWhirter. I knew at that time that he had jumped the Slap Jack mine. He employed me to do some work. I cut brush around the shaft, leveled out and fixed a place to set the windlass.

Q. You had no particular occasion to go up towards the northeast end of the claim?

A. I went up there a little past the middle of the claim I think, where we were going to set the windlass.

157 Q. A little past the middle of the claim?

A. I did not go to the north end.

Q. You didn't go to the north end?

A. No, sir.

Q. And the work you did was in getting the windlass ready *and* preparing to sink on the vein?

A. Yes, sir.

Q. You were employed by Mr. McWhirter to do that mining work, were you not?

A. Yes, sir.

Q. And you were not paying any particular attention to other matters excepting the work you were directed to do, is not that a fact?

A. That is right?

Q. You talked with Mr. Beggs about this case before you came as a witness, did you not?

A. Yes, sir.

Q. You talked with him since you came here as a witness?

A. Yes, sir.

Q. You have talked with Mr. Beggs about the case?

A. Yes, sir.

Q. Now, what is it that enables you to say Mr. Boynton was at the house on the Slap Jack mine on December 31st, 1898, and that he was not there on December 30th, 1898?

A. Well, I would surely know; of course we were in the same house, wasn't we?

158 Q. Was there anything about it left an impression on your mind?

A. No, not particular, only when he came and I saw him when he left.

I had been going home every night, but this night I came home a little later on account of packing my tools. When I came home I saw another man in the house. After the 31st I saw Boynton cutting brush down by the road going to Coyle's house near the northeast corner.

Redirect examination of E. M. ELWELL:

I got the windlass down by the gate where the road comes in the main Yosemite road, close to the Coyles. I had to go down across the northeast corner of the claim to get the windlass. The first of Jan. 1899 was Sunday. I heard that McWhirter jumped the claim Sunday morning. I saw the notice next morning and went out and read it. This was the morning of the 1st. I heard a noise in the night. My dogs were making a terrible racket. With reference to the re-location of the Slap Jack mine, Mr. Boynton came there the night before. That is the same night he came. On the 31st, and it was jumped that night.

159 Recross examination of Mr. E. M. ELWELL:

I got the windlass on the second of January. It was to come on the first, but I went down two or three times and did not get it. I don't think it came until the 2nd. I went after it two or three times. It was not there. This was on Sunday and the windlass did not come. I do not think it came until the second.

Re-examination by Mr. STREET:

I was down three or four times to get the windlass. I went past the northeast corner of the claim along that flat and found that the windlass was not there. I did that on the first. I was told that the windlass would be thrown off that day. It was not there for I was down after it several times to see if it had been left there, before I got it. I do not remember for sure whether I got it that day or the next afternoon. I remember going several times for it but did not find it.

Re-examination.

By Mr. O'BRIEN:

I told Mr. Street that I went down there several times on
160 the first. I do not know whether I got the windlass on the first or second. I am positive that I went there several times on the first, but I am not sure whether I got the windlass until the second.

W. M. SMITH, called by defendants, sworn and examined, testified as follows:

I reside at San Jose. I am a real estate agent by occupation. I am the secretary of the Yosemite Gold Mining Company and the Yosemite Gold Mining and Milling Company. I know E. L. Emerson. I knew him on or about July or August, 1899. I saw him about that time at his residence in Santa Clara county. Mr. Berg was present with me. I think it was the latter part of August, 1899. We had a conversation with Mr. Emerson. Mr. Berg was present. Most of the conversation was had between Mr. Emerson and Mr. Berg. I chipped in occasionally. We drove out to see Mr. Emerson. On that occasion Mr. Berg in my presence stated to Mr. Emerson that the Yosemite Gold Mining Company had a conveyance of the interest of Dr. and Harry Argall in the Slap Jack mine. I was present in the office of Will M. Beggs in San Jose a few days afterwards when a statement was made to Mr. Emerson in regard
161 to the ownership of the Argall interest in the Slap Jack mine. Mr. Beggs made the statement. He said that he or the company, I have forgotten which, had a deed of the Argall interest at that time.

Cross-examination of W. M. SMITH:

This conversation occurred the latter part of August, 1899. I am as sure of this as I am of the rest of my testimony. The conversation was had between Mr. Berg and Mr. Emerson in my presence at the Emerson ranch near Mountain View. The work hands on the ranch were there at the dryer, but they were not immediately present. The conversation took place in the yard. Mr. Berg and myself sat in the buggy and Mr. Emerson leaned against the wheel.

Q. You went there yourself and Mr. Berg for the purpose of bringing about a compromise of this litigation?

A. Yes, sir.

Q. That was your object?

A. Yes, sir.

The second conversation was had in Mr. Beggs' office. Nobody was present except the four of us. At the end of our first interview Mr. Emerson promised us that he would have a talk with Mr. Britton and let us know the result of the conversation in a
162 few days. Mr. Emerson met us at the office of Mr. Beggs and while there the conversation took place.

Q. And both of the conversations and both interviews were held

for the purpose of bringing about some settlement of the controversy in this litigation?

A. Yes, sir.

Q. That was the sole purpose of both interviews?

A. Yes, sir.

PETER BERG, recalled by the defendants, sworn and examined, testified as follows:

I recollect the conversation with E. L. Emerson upon the last of August, 1899. This was at Mountain View. Mr. Emerson and Mr. Smith were present. I told Mr. Emerson that the Yosemite Gold Mining Company was the owner of the Argall interest in the Slap Jack mine. I saw him a few days after that at the law office of Will M. Beggs in San Jose. Mr. Smith, Mr. Emerson, Mr. Beggs and myself were present. I heard Mr. Beggs make a statement to Mr. Emerson to the effect that the Yosemite Gold Mining Company held the title to the interest of the Argalls in the Slap Jack
163 mine. I never received a notice from Dr. Argall, either directly or indirectly, at my residence in San Jose, or elsewhere, which was to the effect that Dr. Argall and his brother were called upon to pay their share or proportion of the $100.00 due for work and improvements upon the Slap Jack Mine. I was the President of the corporation, Yosemite Gold Mining Company, in 1899. I remember the occasion of the quit claim conveyance being delivered to the corporation. 35,000 each, shares of stock were issued and delivered to Dr. Argall and his brother Harry. I was present; saw the stamps affixed and the stock transferred and delivered. This was on the 31st day of Oct., 1899.

I will ask you if you can identify the stubs and some of the certificates of stock which have been returned to the company, being the stock referred to and delivered on that day to the Argalls.

Yes, sir. This book is the stock book of the Yosemite Gold Mining Company. I identify these certificates as being certificate- which were issued and delivered on that day. I identify the stamps and cancellation thereof. These stamps were affixed and cancelled on that day. These are the Argall certificates. I refer to certificate No. 23 for 9,000 shares. These stamps posted on the back
164 of this certificate were cancelled on that day, and the deed delivered then. On the day the quit claim deed was delivered to me or the Yosemite Gold Mining Company. The day of the cancellation of the stamps is October 31, 1899. This deed was delivered to me by Dr. Argall at the head of the stairs going to Dr. Argall's office in the presence of Harry Argall and Gilbert Rayburn. That was on the same day the stamps were cancelled.

Cross-examination of PETER BERG:

About the last of August, 1899, I was out to Mr. Emerson's place near Mountain View.

Q. Mr. Berg, what was the occasion of your going out there at that particular time?

A. Was going out there partly at the request of Mr. Emerson to straighten out matters.

Q. You didn't go out there for the purpose of telling him that the Yosemite Gold Mining Company had a deed to the interests of Harry Argall and F. L. Argall in the Slap Jack mine, did you?

A. I think he knew it before. Of course, he and I had been talking about that before.

Q. Well, is it not a fact you went out there to see if a settlement of this controversy concerning the title to the Slap Jack mine could not be brought about. Is not that the purpose of your visit?

A. Partly, yes.

165 Mr. Emerson's people were cutting fruit there. As near as I can recollect it was in the latter part of August. Mr. Smith, Mr. Emerson and I were the only ones who were present at the time of this conversation. The next conversation was had at Mr. Beggs' office a few days later. After we received the deed on October 31st, I delivered it to the Secretary of the Company. I had nothing to do with the recording of it. It is not a fact that the certificates had been made out for some time before the deed was delivered. I am sure of that. The deed was delivered by Harry Argall. During the year 1899 he lived in Tuolumne County. He was in San Jose October 31, 1899. Dr. Argall gave the deed to Harry and Harry brought it over to the office. The reason that I remember that it was October 31st, 1899, because I signed the certificates and looked them over and looked at the stamps. Without looking at the date of the certificates and the cancellation of the stamps I might not be able to fix the date exactly.

WILL M. BEGGS, called by the defendants, sworn and examined, testified as follows:

I am an attorney-at-law. My office and residence is at the City of San Jose. On October 31st, 1899, there was in my office Mr. Berg, Harry Argall, Gilbert Rayburn and myself. Gilbert Rayburn was Secretary of the Yosemite Gold Mining Company. On that

166 day Mr. Berg, Harry Argall and Mr. Rayburn came into my office and the stock in the Yosemite Gold Mining Company going to Dr. Argall, Harry Argall and James Paul was delivered to Harry Argall, and at that time this quit claim deed that has been offered in evidence and marked plaintiffs' Exhibit "16" was delivered to the company. It was handed over to me and I put it in the Company's box. On that day Harry Argall bought a large quantity of stamps, about $40 or $50 worth, and I cancelled most of them myself. They are initialed P. B. for Peter Berg, and dated 10, 31, '99. These stamps were put upon the stock delivered to Harry Argall. The stock was delivered to Harry Argall for each of the other parties—that is, Dr. Argall and James Paul. Harry Argall handed the deed to Mr. Berg and he handed it to me. I remember in the latter part of August, 1899, when Mr. Emerson, together with Mr. Smith and Mr. Berg, being in my office at San Jose. On that occasion I told Mr. E. L. Emerson that we had a deed to the Argall interest in the Slap Jack Mine.

Cross-examination of WILL M. BERG:

This conversation was in the latter part of August. There had been another deed given by the Argalls to the Yosemite Gold
167 Mining Company for their interest in this mine. This was a grant, bargain and sale deed. That deed was afterwards destroyed. I do not know where it is. I prepared the grant, bargain and sale deed of this property, as well as some other property that the Argalls and James Paul were conveying to the company. It was not recorded. It was delivered. After it was executed and delivered either Dr. Argall or Harry came to me and said that they preferred to deliver a quit claim deed, and at his request I prepared the quit claim deed and the other was destroyed. I do not know where it is; it may be at my office; I cannot say. I know we had it. I was the attorney for the Argalls and the company.

Redirect examination of WILL M. BERG.

By Mr. KENNEDY:

I heard the testimony of Dr. Argall with reference to the service of a notice, which he claims had been served upon him by Mr. Emerson and Mr. Britton in regard to requiring him and his brother to pay for their proportion of the work for the year 1898 upon the Slap Jack mine. The Dr. did not deliver that notice at my residence. He brought it over to my office and said that it had been served a few minutes before. He delivered it to me December 20th or 21st, 1899. This is the paper that Dr. Argall gave me.
168 Thereupon the said paper was offered in evidence and marked defendants' Exhibit "6," (This is the same as plaintiffs' Exhibit "15," except that there are no affidavits of service attached thereto).

JAMES PAUL, called by the defendants, sworn and examined, testified as follows:

My name is James Paul, reside at Big Creek, Tuolumne County. I know McWhirter, knew him on the 31st day of December, 1898. I went with him to the mine about 2 o'clock. The Slap Jack mine. We went to corners, shafts and all over it. Went round the boundary lines. Examined monuments and posts. Was there about 1 and ½ hours. After leaving there we went together to the Dewey claim. I did not see anybody at work on the Slap Jack mine during the 31st of December. If there had been any one there we would have seen them. After that McWhirter went to Groveland, I went up to Big Creek. I saw McWhirter that evening at Groveland. I went with him to the Slap Jack mine, now known as the Jim Blaine mine. Got there a little after eleven o'clock P. M. We walked around a little, sat down and talked. Went in the blacksmith shop and sat down there and talked until 12 o'clock. Till the
169 whistles blew and shots went off. We took out our watches and compared them. In the blacksmith shop. We waited a little then showed McWhirter a light, while he posted up the notice

of location on a big pine tree about 15 or 18 feet from the blacksmith shop. That was about 150 feet from the house. We then waited for an hour or more, bid each of us good bye, and each went our way. I have been on these premises during 96-7-8. I know the barbecue hole. That hole in the spring of '98 was 5 feet deep. There was no work done on it at that time. There was no work done on it in the spring of '98 so far as I know. That hole was dug before I ever saw the mine. I first saw the mine in '96. It was caven in, no timbers in it. It would take about an hour and a half to clean it out. I cleaned it out in May or April, '97. It took about that. Might have been two hours. There were two or three small holes near that. They are old prospect holes nearly leveled up.

Cross-examination of JAMES PAUL:

I became first acquainted with Mr. McWhirter on Dec. 31, 1898. Mr. McWhirter came and introduced himself to me. He asked me if I was prospecting around there. If my name was not Paul—at Groveland. He came in that day, I believe. He asked me
170 if I had any property around the country, and what property I did have. We talked about mines. He asked me about the Slap Jack, and said that he was going to put a notice on that night and asked me to go with him. I did. He left Groveland about half-past twelve o'clock or one. Arrived at the Slap Jack mine about 2 o'clock. He told me where he wanted to go. I showed him the corners on December 31, '98. I was not there on the 30th. I was there when he posted the notice I am sure. Must have been past 12. Very little moon that night, little cloudy. I think there was a little; we could just see our way round a little. I could not say exactly moonlight, might have been good starlight. Could not see our watches in the shop. I had a candle in my pocket and matches, too; I lit the candle and looked at our watches. Was there about one and one-half hours on afternoon of 31st December. On Dec. 31 stayed on mine about one and one-half hours. We found six posts, monuments and 3 blazed trees. These were the old markings of the Slap Jack mine. There was a monument at all of the four corners and a center monument at each end of lode line. When I came to these monuments I showed them to McWhirter and I think he numbered them and built up around them. He put stakes in all monuments. We started at northeast corner. He
171 built a mound at the northeast corner, around the post and marked the post. It was not a sharpened pole. Not sharpened at all. I do not think he drove a stake there; fixed it in the ground. Walked around and gathered a few rocks. After that we went to the Dewey claim. We were about a half hour on the Slap Jack, and then we went to the Dewey claim. We went all around the Slap Jack and fixed all those mounds in an hour and a half. Newly marked the easterly center, got a pencil and marked it. There was a post there. Fixed up the westerly middle mound. Gathered fresh stones around it. There was a stake there. He did not drive the stake down, fixed stones around it. That is a pretty

steep hill, whole lot of brush on the ground and chapparell there; in a bad place Mostly slate rock there. Few quartz. The monument would stand there. Fixed the southeast corner marked that and fixed rocks around it. Fixed up the southwest corner some way. Gathered up additional rocks and added to old monument. There was a stick in the mound. A round pole. He numbered it, but did not drive it down. I cleaned out the barbecue hole and prospecting it, in about two hours. Not longer than that. I was working for Argall doing that. This Mr. Harry Argall here. Did not work here after posting that notice. I went to Big Creek. I went
172 to see another claim adjoining Slap Jack on the west, there was a claim there open for location.

Thereupon the defendants offered in evidence deed from R. S. McWhirter to W. H. Christmas, dated May 5th, 1899, conveying what is known as the Jim Blaine and Slap Jack mine, and marked defendants' Exhibit "7." Also deed from W. H. Christmas to Peter Berg, dated May 5th, 1899, conveying the same property, which was offered in evidence, admitted and marked defendants' Exhibit "8."

Also a deed from Peter Berg of the same property to the Yosemite Gold Mining Company, dated June 1st, 1899, which was admitted in evidence and marked defendants' Exhibit "9."

And thereupon the defendants offered in evidence the Mining Rules and Regulations of Tuolumne County, adopted October 5, 1872, and in force on January 1st, 1896, as found in Volume one, Quartz Claims, Tuolumne Mining District, pages 2, 3, 4, 5 and 6, and the same were admitted in evidence and marked defendants' Exhibit "10," and are as follows, to-wit:

SECTION 1. This mining District shall be known as the Tuolumne Mining District and its boundaries are hereby declared to be the same as the boundaries of Tuolumne County, California.

SEC. 2. All rules and regulations of Quartz Miners now or
173 heretofore in force in any portion of said District, governing the location, manner of recording, or amount of work necessary to hold possession of any mining claim, upon lodes of quartz or other rock, or veins of metal, or its ores in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits or in any way affecting any such claim, are hereby repealed; provided this repeal shall not effect the location of claims heretofore located.

SEC. 3. Mining claims hereafter located in said District upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner to-wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim. Said notices may be in the following form, to-wit:

"Notice is hereby given that the undersigned have taken
174 up — hundred feet of this vein or lode, and that the claim so taken up is described as follows: (Here insert description.)

"Dated — day of —— 18—.

A. B.,
C. D.

Locators.

SEC. 4. There shall be a Mining Recorder for said Mining District (who shall reside and keep his office in Sonora) elected on the first Saturday of October in each year, for the purpose of which election and for the purpose of altering or amending these rules and regulations, there shall be held at the Court House in Sonora, in said County, a miner's meeting on the first Saturday in October in each year. The said Recorder shall hold office for one year, and until his successor is duly elected. In the event of the death or absence or other disability of the Mining Recorder in the interim between said meetings, the President of the previous miners' meeting, and in the event of the disability of the President, then the Secretary of said meeting shall have power to appoint a Mining Recorder *pro tem.* who shall hold office till a Mining Recorder shall be duly elected, as in this section provided.

SEC. 5. It shall be the duty of the Recorder to procure a suitable book or books in which to record the proceedings of all miners' meetings hereby authorized to be held in said district, and to record
175 therein all claims that may be presented to him for record. The Recorder shall be entitled to charge in advance a fee of one dollar for each claim which may be presented for record. He shall also be entitled to charge a fee of one dollar for a certified copy of the record of each claim recorded. The recorder shall have authority to appoint a deputy, and his books shall be open to public inspection at all business hours, and all examination of his records shall be made in his presence or in the presence of his deputy. It shall be his duty, upon the election or appointment of his successor, to deliver to him all books and papers appertaining to his office.

SEC. 6. All claims hereafter located in said District, the notices of location of which shall not be filed for record with the Mining Recorder within thirty days from the date of such notice of location, shall be regarded as abandoned, and shall be open to location by any party in the same manner as though no location thereon had ever been made.

SEC. 7. All persons holding claims heretofore located, upon which mining operations are not actively and continuously carried on, shall within six months from the passage of these rules and regulations, file with the Mining Recorder for record, a description of such claim or claims, and the date of location thereof; such de-
176 scription shall be substantially in conformity with the provisions of Section 3 of these rules and regulatons, and the claimants of all such claims in such description extend the width of their claims to three hundred feet on each side of the center of the vein or

lode; provided such extension does not interfere with any existing rights. If such description be not filed for record, the claim shall be regarded as abandoned, and open to re-location in the same manner as though no location thereon had ever been made.

SEC. 8. The amount of work necessary to hold possession of a mining claim shall be the same as provided in Section 5 of the Act of Congress, approved May 10th, 1872, entitled "An Act to promote the development of the mining resources of the United States," which reads as follows:

"On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this Act, ten dollars worth of labor shall be performed, or improvements made each year, for each one hundred feet in length along the vein, until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim and upon such failure to comply with these conditions, the
177 claim or mine upon which failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, which said amount of work shall be done exclusively on the vein or lode in the development thereof.

JOHN APP, *Chairman*,
I. J. POTTER, *Secretary*.

GILBERT RAYBURN, called by the defendants, sworn and examined, testified as follows:

I was a director of the Yosemite Gold Mining Company. Secretary *pro tem.* on October, 1899. I reside in San Jose, and was at Mr. Begg's office, also Dr. Argall's office, on that day. I went over to Dr. Argall's office that day in company with Mr. Berg to see him in relation to the quit claim deed concerning the interest of Dr. and Harry Argall, and there was some talk about the deed to the Slap Jack Mine. Dr. Argall had the deed in his hand at the time we came out to the head of the stairs. At that time Dr. Argall, Harry Argall, Mr. Berg and myself were present. Finally Dr. Argall said to Harry, "Take it. Take the deed over to the office and settle the business." We went directly across the street to Mr. Beggs' office.
That is Mr. Berg, Harry Argall and myself did. The deed
178 was turned over to me as Secretary *pro tem.* of the Company on that day by Harry Argall. Mr. Berg, Harry Argall, myself and Mr. Beggs were present on that occasion. Immediately upon the delivery of the deed the stock belonging to the Argalls and Jim Paul were delivered to Harry Argall. The stamps were put upon the stock and cancelled that day. Harry Argall furnished the stamps. He made a remark that he had to go out and borrow some money to buy the stamps. He borrowed the money from Dr. Crothers. The stamps were cancelled on that day, some by Mr. Berg and some by myself.

Cross-examination of GILBERT RAYBURN:

I was a director of the Yosemite Gold Mining and Milling Company. I was interested in the Yosemite Gold Mining Company; I was a director of that company. I was Secretary *pro tem* about a week during the latter part of October, 1899. I can tell that because I filled out the certificates in my own handwriting and by referring to the certificates I can tell that that is the time. Also by the cancellation of the stamps. These are the two circumstances which enables me to fix the date when the deed was delivered. I am an
179 assayer by profession. This deed was first handed to me by Harry Argall as Secretary, and I handed it to Mr. Berg.

GABE MILLS called by the defendant, sworn and examined, testified as follows: My name is Gabriel Mills, and I reside in this County, in Groveland. I know McWhirter. First saw him on December 31st at the brewery. I was employed by him. I think it was Sunday, January 1st. I was to go to work on the Jim Blaine mine. Formerly the Slap Jack. We went to work for him on the Jim Blaine mine Monday, the 2nd. Worked with Mr. Elwell, worked nine days and a half. Mr. Coyle worked with me, also. I think that I worked until the 12th or 13th. He paid me $28.50 for the work. At $3.00 per day. I was sinking a shaft. Worked sometimes on the bottom, sometimes on the top. McWhirter did a little work. Sometimes helped at the windlass, sometimes take the shovel. I was on the premises when the water was taken out of the shaft. Sometimes I drove the horses, sometimes dumped the bucket. Mr. Sheridan was my partner. We were on the night shift. There was nothing done but dumping the water. Of course there was always a little water on the bottom. I never bailed any on my shift. That was not
180 done on our shift. Never saw the bottom. They took off a piece of plank to make a hole for the rope to go in. That is the only work I seen done there. No dirt taken out on our shift.

Cross-examination of GABE MILLS:

I first became acquainted with Mr. McWhirter on December 31st. Never met him before. Went to work for him on Monday. The second day of January. Know nothing of posting any notices. I saw the notice. Saw it first with McWhirter on Saturday the 31st. I signed it. Do not know that it was posted, only I saw it there. I do not know whether that is the notice that I signed or not. Was not there when it was put up. I signed it before it was put up. I was not on the property on the 31st. I worked for Mr. Emerson four shifts taking out water. That shaft may be 50 or 60 feet deep I am a miner. Have been all my life. I was down the shaft. Not in the drift. There was water over the sump. I did not bail any water. There was water in the bottom of the drift when I was down, three inches or 2 or 3 feet. When the bucket would not fill we left it down until more water would run in. The sump was lower than the mouth of the tunnel. When I was down it was not out
181 of the drift. The last shift it would fill itself we worked. I could not see if the water was out in the night time. Only

went below once. I was dumping the bucket. I could tell when I dumped the bucket when it came up full or half full how much water was there. I saw this notice the 31st day of December. At the brewery. He showed it to me, asked me to sign it. I signed it as a witness. I had been working at the brewery almost since Christmas with the exception of a few days that I worked for McWhirter.

F. F. BRITTON, called by the plaintiffs, sworn and examined, testified as follows:

I was one of the owners of the Slap Jack Mine in the year 1898.

Ques. Did you perform any labor upon the Slap Jack Mine during the year 1898?

Objection by Mr. STREET: I object to that on the ground that it is not rebuttal. That it is incumbent upon the plaintiff to show, as they did attempt to show, that the assessment was done for the year 1898, and it was part of their case in chief, and it is not now rebuttal testimony; that if anything should arise we would not be precluded from rebutting this testimony.

The Court overruled the objection, to which order and ruling the defendants then and there excepted.

Ans. Yes, sir.

My name is F. F. Britton. I reside at San Jose, California.
182 I know the Slap Jack Mine, located about two miles east of Groveland. I am one of the plaintiffs in this action. I was first on the ground the last of June, 1898. I did not examine the corner monuments in that June. In October I saw all of the monuments. I saw two monuments next to the White Claim in June. In October I saw the three spoken of at the east end, and one on the southwest corner, the one in the center end, one on the northwest corner, that is the one in the center on the west end. Found the monuments on all the corners, found two center monuments, one at each end. Found two center monuments, one at each end, all in October. At the west end the ground rises very rapidly, and the brush is difficult to get through. I saw a notice on a tree at the west end, saying that it was the center line if I remember. On the center line of the Slap Jack, I don't mean a mining notice, I mean a blaze on a tree, and a pencil mark. A fresh blaze, and the gum had flowed over it and covered it up, preserving it. There was a monument at the east end, with a post in the center of it. I did work on the mine in 1898. The first work done by me was October. I worked immediately over the ledge—part of it sinking. Mr. Emerson here, one of the plaintiffs here, worked with me and we worked three days each. Most of our work was sinking on the ledge.
183 No one else worked but Mr. Emerson and myself. I sent Mr. Boynton up there. In the early part of the year 1898 I paid for work done on the Slap Jack Mine. Done in March, 1898, I paid $35.00. Paid it to Mr. Emerson. It was for taking the water out of the mine. I paid him my check, is in evidence. I was not

there individually. I did work there myself the year 1899. Commenced on the 10th or 11th. Worked 12 and ½ days. That was of January, 1899. Mr. Boynton worked the 12 and ½ days with me. No one else worked for me or Mr. Emerson that year that I know of. I am the same F. F. Britton mentioned in the deed read in evidence. I employed Mr. Boynton and instructed him to clear the brush, cut the willows on the flat, near the foot of the hill, near the east end.

Q. What was that work done for?

A. The calculation was to fix up that for a mill-site?

Q. Was all of that space cleared off, cleared for a mill-site?

A. Yes, sir.

When he worked with me the character of the work was an open cut made over the ledge near the shaft, and another open cut on the east end. Mr. Emerson and I took the measurements of the mine, in October, with a steel tape, and found the length to be nearly 1500 feet by 600 feet in width. I have been several times to every
184 corner, every post. I examined them closely in January before we quit work. I know there is a ledge of gold-bearing ore in this mine.

"I have seen the ore from there and picked up specimens of gold from it that came out of the shaft. I have seen portions of the vein. It crops out of the surface in places."

I made proof of labor for the work commenced in December, and ended some time in January. (Hands paper to witness.) That is a proof of labor of the work done by Mr. Boynton and myself. That is my signature. Plaintiff's Exhibit 13.

Cross-examination of F. F. Britton:

This proof of labor shown me and which is marked, subscribed and sworn to before Crittenden Hampton, the 26th day of January, 1899, was for the labor done by myself and by Boynton in January, 1899, mostly. Some of it was done in December by Mr. Boynton. That is his one day's work in December, 1898. I also worked there in October. We made one open cut very near the shaft, that is near the house. The other cut is just across the little stream that runs across the property. Mr. Boynton and myself run those cuts in January, 1899. One cut averages about seven feet wide. Another about six feet wide on vein. That was done in January. And
185 draining tunnel. That was the first work I did there when I went up there with Mr. Boynton. Mr. Boynton cleared off the brush mostly, before I got there. Went to work at one of these cuts, and some brush had to be cut off to clear the ground in order to get at it. Just a trifle of the brush was cut after I got there. I was there in June, 1898. I live at San Jose, and am in the orchard business. Also in real estate business, partly; I do not know that I am a practical miner. Most of my experience has been on the Slap Jack Mine. I went there to see the property, as I had a deed to it, and wanted to see it. I was there two or three hours in June, 1898. I did not return to the mine then until October. In June, Mr. James Paul was with me. Mr. Emerson was with me in October, 1898; we

came by stage and stayed in Groveland over night. Went to the mine next day. That was the 11th. Returned to San Jose about the 12th of November; I had other mining interests there. I didn't see the other the first time. Stayed at the house in October. Mr. Emerson did the cooking—lived right there. We bought a bill of provisions and took them with us. Were there about a month. Stayed there in October and a part of November. Mr. Emerson was there all that time. Mr. Elwell was living on one end of the end of the house at that time. With his wife and children. With reference to the first shaft, we did the work in October, west of the main shaft.
186 Between the shaft and tunnel that Mr. Argall spoke of. This shaft is 500 or 600 feet from the east center monument of the claim. The main shaft is 200 yards from east end of claim. Where we did those three days' work is 175 or 200 feet from the shaft. There we were sinking. It was shallow, about five or six feet deep, about five feet long. There were stringers of quartz in it. There was mixed rock, red soil and quartz. I would call it plain county rock. I don't know the character of rock in that hole. I would know it if I saw it. I can't give the geological name of it. I don't claim we sunk all of that five or six feet. There was a hole there. We sunk on that two or three days as far as we could, the rock was hard. We sunk probably about three feet. It was picking ground, but extremely hard so we stopped it. That was principally all the work Mr. Emerson and I did in October. We looked up the corners and cut some brush, the rest of the three days. At the easterly end of the claim it is rather flat. The center monument is lower than the southeast corner. The claim is 1500 by 600 feet. Nearly east and west. This road going to Yosemite does not cross the claim, but is away about ¼ of a mile. About 600 feet of the east end is a shaft. The water runs from the south towards the north. I understand the shaft near the house is about 65 feet in depth. The open cut is about 50 feet; it is not
187 far from level. The stream flowing here is small. I think the shaft is elevated about thirty feet from where the brushes were cut. I took the elevation in October. Took it up to the collar of the shaft. And also to the top of the hill. The vein crops out in the place where the water runs and up by the barn, about three or four feet wide. We have been investigating about a mill for several months.

Q. Have you had any mining man or expert pass upon that as a place for a mill site?

A. I think I am capable of passing on that myself. That is the most feasible location there is on the claim. The amount of fall required to run the rock out on the tramway depends on the kind of machinery you use. We had in contemplation two kinds of mills—one roller process, another stamp mill.

Q. Do you know you could erect a stamp-mill upon that site, and have only 30 feet fall and have sufficient fall to run a stamp-mill there?

A. It was the most feasible place there is on the property in our estimation to put that up.

Q. Do you know whether or not a mill could be erected there, a stamp-mill and run your ore down there and run it into your rock breakers and get it into the mill?

A. Well, as I said before it depends some on the kind of
188 machinery a man uses.

I spent about a day or a day and a quarter finding the corners and brushing out on the line. Both myself and Mr. Emerson did that in October. We left there about the 11th or 12th of October. On the day of leaving there was posted a notice upon the house. I also left a copy of the notice with Mrs. Elwell.

A. D. CORNWELL called by plaintiffs, sworn and examined, testified as follows:

My name is A. D. Cornwell. I reside at Riverside, California. During the year 1898 I resided in Oakdale. During the Christmas vacation of that year I was in Groveland. From Friday night, December 23rd, I think was the day, until Saturday night, December 31st. I was engaged in hauling freight and delivering goods for my brother, Z. L. Cornwell, who runs a general merchandise store in Groveland, Tuolumne County. I was in his employ during all of the time between December 23rd, 1898, and December 31st, 1898, at Groveland. My duties were to haul freight from Chinese Camp and deliver goods into the country around Groveland; tended store when my brother was away and took care of the team. Dur-
189 ing the latter part of December, 1898, I met J. E. Boynton, in front of my brother's store in Groveland. This was on December 30th, 1898. It was about half past two or three o'clock. I accompanied him on that day from Groveland to the Slap Jack Mine. He had purchased some provisions and I hauled them to the mine. He had a roll of blankets and some mining tools; he had an ax, a shovel and a pick. I took those things with me. I left him at the house on the Slap Jack Mine. I was familiar with that mine. I had been to the Slap Jack Mine before that. I had read the location notice and been there with my brother, and he told me it was the Slap Jack Mine. I took the goods out of the wagon and put them on the porch in front of the house and left. This was Friday, the 30th of December, 1898. I remember this from the circumstance that my trips to Chinese Camp were on Mondays and Thursdays, returning Tuesdays and Fridays. Friday was the day I came back up with the goods from Chinese to the store. This just occurred when I met Boynton. My brother directed me to take him to the Slap Jack Mine. There is another fact or circumstance which I can relate. I left Groveland the next afternoon and arrived in Chinese late that afternoon, I judge about 5 o'clock, and the boy who had been engaged to take my place was with me with a double team. I had a light rig and I helped him load the wagon
190 with freight. I stayed at Coulters that night, and the next day was January 1st, and I went down to Oakdale. That night a young man from Chinese Station and I were in the bar-room and we were playing pedro until 12 o'clock with old Mr. Coulter. I

remember distinctly at 12 o'clock he got out an old horse pistol and went out in front of the hotel and fired it four or five times.

Q. Is there anything else, any other circumstances that enables you to fix the date, anything in reference to your going to school?

A. I think that I started to school—I think school opened on the 2nd of January, and for that purpose I went down there to Oakdale and started to school, I think on a Monday, the next day.

Q. Mr. Cornwell, state whether or not you are positive that it was on Friday, the 30th of December, 1898, that you delivered Mr. Boynton with his mining tools and provisions at the Slap Jack Mine.

A. Yes, I am positive.

Cross-examination of A. D. CORNWELL:

I am 22 years old. This was in 1898 that I was at the Slap Jack Mine. I was 19 then. We generally started to Chinese Camp and loaded up that night. The roads were slippery then. It took five or six hours to make the return trip. I made three trips
191 to Chinese while there and two trips back. I made the first trip on the 26th and the second on the 29th. I went down on Thursday. I had never met Mr. Boynton before. I got to town about 3 o'clock. I never took anybody to the Slap Jack before. It took about three quarters of an hour to go there. I passed Coyle's house. I did not see anybody at the mine. Boynton got out and knocked at the door; nobody was there. I only remained there about ten minutes.

E. L. EMERSON called by the plaintiffs, sworn and examined, testified as follows:

It is thereupon stipulated by and between counsel for the respective parties in open Court that the testimony of E. L. Emerson heretofore given upon the former trial of this cause, which trial took place on April 10, 1899, might be considered as given upon the trial of this cause, subject to the same objection interposed to the first question propounded to F. F. Britton; that said testimony is not in rebuttal and that it is incumbent on the plaintiffs to show that the assessment work for the year 1898 was part of their case in chief.

The Court overruled the objection and thereupon the testimony was admitted in evidence.

192 E. L. EMERSON called by plaintiffs, sworn and examined, testified as follows:

My name is E. L. Emerson. I am one of the plaintiffs in this action. The same Emerson named in one of the deeds. Reside at Mountain View, Santa Clara County, California. I know the Slap Jack Mine; it is about two miles east of Groveland, in Tuolumne County, California. I was there in 1898. The first time I was there in March. I did work on the Slap Jack Mine during the year, 1898. I commenced work there in March, 1898. Walter Coyle, Charley Smith, Fred Smith, Gabe Mills and Sheridan assisted me in the

work. The nature of the work was taking water out of the shaft; hired two horses from Gus Schroder, and by means of a bucket and rope, running over a sheave, at the top of the gallows frame, and with a snatch block at the bottom with the horses walking straight out with the bucket, the water was raised by that means, hoisting the bucket straight out of the shaft.

Worked night and day. Two shifts. It was twelve hours in each shift. Kept working continuously until we got the water out. The shaft out of which I took the water was 65 feet deep. Took the water all out down to the drift running west. Part of the
193 timbers in the shaft were good and part had slipped. We removed some of the timbers that had fallen in, also washed down the ledge, brightened things up, and took out some mud. Only washed down the tunnel, the face and breast and roof and brightened it up. We unwatered the tunnel. I was on the ground about fourteen days. I worked about ten. Gabe Mills worked four shifts. Paid him $12.00. I value my own labor while there at $30. I was paid for my labor—Mr. Britton paid me. I was also an owner of the mine at that time. Sheridan worked there five shifts; paid him for his labor $15.00. It happened that Sheridan worked five shifts and Mills only four shifts, because Mr. Mills was taken sick with a bad cold. He quit—was sick with a bad cold. It was very cold, snow on the ground part of the time. W. J. Coyle worked seven shifts. I have not paid him in full. I have so far paid him $17.00. Hoisted by horse power. Paid $5.50 to Schroder for the horses and was to pay for feed of horses; paid for hay to feed them $8.13. The team was attached to a rope. The rope was 100 feet long that we used at the hoist. I bought the rope for that purpose. Paid $4.00 for that rope. Charles Smith worked there with his team, for Mr. Schroder's team did not do all the work. Paid Fred Smith and C. Smith and for team $15. I still owe Coyle $4. Have had no settlement. When we were working at night
194 we used a lantern. Oil for lantern cost 80 cents. I sent to Chinese Station for a pulley, that cost 75 cents, and 25 cents for telephoning; then we found that we could not use the pulley and borrowed one from C. Smith. Mr. Mills was driving team. Sheridan was landing buckets. Mr. Smith drove his team. Mr. Coyle drove nights, part of the time, and part day time. I went down the shaft and Mr. Coyle went with me. We were down in the mine only part of one day. In three days and three nights we took it down that low, not to the bottom. There is a sump down in the bottom of the shaft. Did not clean out the sump. We kept the water down eight days, if I remember rightly. In October after that I did work on the mine. Mr. Britton was with me, and we worked three days each. Part of these men were paid in cash and part in checks. (Check paid to Smith placed in evidence and marked plaintiffs' Exhibit "K." Check paid C. — placed in evidence and marked plaintiffs' Exhibit "L." Check same Gus Schroder, marked same "M." Check $8.12 for horse feed paid to T. H. Clark placed in evidence by plaintiffs and marked plaintiffs' Exhibit "N." Check same, Gabe Mills, $12.00 for labor for this March assessment, same and

marked plaintiffs' Exhibit "O." Check drawn in favor of F. F. Britton, indorsed by W. J. Coyle for $15, placed in evidence
195 and marked plaintiffs' Exhibit "P." All these checks paid for labor.) That is a proof of labor, which has just been testified to. That is my signature. (Plaintiff's Exhibit 14.)

Cross-examination of E. L. EMERSON:

I live at Mountain View, am a farmer and fruit raiser. Lived there since last July. Prior to that time was farming. Have never followed mining as a business. Sometime between the 10th and 15th of March I went to the Slap Jack Mine. I went there to take that water out. An expert was coming to examine the mine, therefore I took the water out. To clean it up so that he could see it. I started that work in March. Do not know the date. Walter Coyle was the first man I hired. I used Schroder's team. We started to use another man's team and he would not work. Had to get ready first. First made a place to land bucket. One part of the gallows had to be taken out and a spout put in. I was working. I do not know who was helping me. Think Walter Coyle. That day Walter worked there. He worked two shifts longer than the others. He did other work besides getting ready. He worked with me around the claim before that. We put up the rope and pulleys. The sheave was in the gallows frame but it had to be lowered down. Walter Coyle assisted me in lowering the sheave. That and putting in rope and pulley constituted about all the work that then had to be done. Three days and three nights to get the wat r out.
196 Got the water out and then we had to keep it out till the expert could come, but he did not come that I know of. I never saw him. We kept the water partly down so that the expert could see it in three hours if he came. I heard the expert came. I heard afterwards he did but I never saw him. Anyway, left before I saw him, and do not know that he ever came. I took the water out solely that the expert could see the mine, and if he reported it favorably the mine would be sold. We were three days getting the water down to the drift. Took it out to the sump, took it out of the drift. The sump is covered with plank. I did not see the bottom at all. We bailed it down to the sump; I went down, as the large bucket would not fill, I took a small bucket and filled the large bucket. I did part of that. Walter Coyle might have done some of that. Was bailing for a part of a day. I didn't work regularly. I looked around to see that things went on. Not all the time. To make the bucket dip there was iron on one side. Lower the bucket and it would fill itself. That is, when there was water enough. It took one man to drive the horse out and another to land the bucket. The bucket was quite a large barrel. Do not know how much it would hold. It was ironed up. I got that barrel in the house at the time. I kept the water out eight days I think. I am not clear on that. At that time the Smith boys and Walt Coyle did the driving. I paid the Smith boys $15 for their
197 bill. I can't say the exact number of days they worked. No bargain was made, he said the bill was $15 and I paid it.

I think I used Schroder's team 5½ days. Mr. Mills and Mr. Coyle drove that team. Agreed to pay Schroder 50 cents each horse per day. That was $1 per day. That I paid him for 5½ days. I fed the team. Bought $8.12 of hay from Clark, 650 pounds. The hay was all consumed when I left—might have been five pounds. I worked ten days by looking after and superintending the work. In and out and all around the mine. I don't know as I did all of the sawing out of the gallows frame, and putting in the spout. I couldn't say how much I did personally. I was around the work superintending all through. I believe I drove team for a while, all kinds of work. Might have drove team for an hour or two, might be more. Might have been dipping in the shaft for half a day. I am one of the owners of the claim. A half day would cover all the labor that I did, working on the mine outside of superintending. In October we worked on top of the ledge in one place, and measured off the lines. Mr. Britton and self, and looked up the corners. I think we spent two days at that, and one day surveying and looking up the corners. Think we worked two days on the ledge. We worked on the ledge west of the shop—west of the barn. There was an old hole there, we cleaned it out and sunk it deeper. I think we worked there two days picking down the
198 ground, it was hard picking. We went to work there about half past seven, sometimes. About that time. Went there twice. Quit at noon. Commenced at 1 in the afternoon. Quit when it got dark. Before we sunk, that hole was four feet deep. We throwed the dirt out. There was a good averaged sized pile. Did not measure the dirt throwed out. The hole was not full at first. It was about six feet square. Caved in about 1-3 full. It was a little deeper in the center. I don't know how long it took to take out the one foot of loose dirt, one foot deep. Both did not work at the same time in the hole. We worked by turns, when I was in the hole Mr. Britton was out. I do not know how long shifts we worked. He used the pick and I used the shovel. It all had to be picked. Sometimes both worked in the hole, not as a rule. After we cleaned out the hole, we sunk it about two feet deeper. It was picking dirt. Not solid rock. Picking ground, but very hard. Some loose quartz in it, all kinds. I think it was six feet deep when we left it. Could not see out when standing in hole. There was dirt thrown out all round the hole. I bought the rope from Smith. I know Doc Roberts. I did not borrow that rope from Doc. Roberts. I do not know that it was returned to him. I paid Smith at Big Oak Flat. Second-hand rope—yes. I left the rope there when I left. After the water was out we took out some loose boards and timber and washed down the face of the drift. That drift is 20 feet. It is seven feet high.

199 Redirect examination of E. L. EMERSON:

I was sent up there to take the water out. By Mr. Britton and Mr. Griswold. I was hired in the capacity of superintendent.

Q. Were you paid for your labor?

A. It was sent to me by Mr. Britton.

The COURT: He testified that he got $15.00.

Mr. STREET: He says he was paid $30.00 by Mr. Britton.

Mr. HAMPTON: What is this? (Hands paper to witness.)

A. A check from Mr. Britton.

Q. Drawn in your favor?

A. Yes, sir.

Q. This check is drawn in favor of E. L. Emerson by Mr. Britton for $30.00, March 28th, 1898, and also written on here is $10.00 of this D. Griswold paid."

Q. For what was this $30.00 used?

A. It was used in the payment of the different ones. You see I sent it to the First National Bank and checked against it.

Q. Was any of this money by this check paid you for your services at that time?

A. No, sir.

The COURT: How much did you receive for your services?

A. Nothing.

200 I know that there is a ledge of gold-bearing rock there. Claim extends easterly and westerly.

Thereupon it is stipulated by and between counsel for the respective parties that the testimony of J. E. Boynton given upon the former trial of this cause of action, subject to the same objection, ruling and exception made to the testimony of F. E. Britton and E. L. Emerson that it is not rebuttal. The following is the testimony given at the former trial.

J. E. BOYNTON called by plaintiffs, sworn and examined, testified as follows:

My name is J. E. Boynton. I reside in San Jose, and am an engineer. I saw the Slap Jack mine, it is situate in Second Garotte. I first knew it December 30th, 1898. December 30th is the first time I was ever on the Slap Jack Mine. I came away from there on the 25th day of January, I think. I was doing work there that I was sent there to do by Mr. Emerson and Mr. Britton. I commenced work on the 31st day of December, 1898. The first work I did on the Slap Jack Mine was cutting willows there.

Q. What was the character of the work as to cutting willows, anywhere and everywhere you found them?

201 A. No, sir. I was to clear a certain part; specified about where I was to work.

I have seen corners of the Slap Jack Mine. I have seen northeast, southeast and southwest corners. There are monuments; there is a mark in the center at the east end—a monument of stone. I did not see the center stake at the west end. The work I did was inside the lines. I helped Mr. Britton later when he came there, running a drift on the ledge. That was on the Slap Jack Mine. I worked there 21 days continuously, excepting Sundays. It stormed and then I did not work all day, but I worked every day I was there. Mr. Britton and Mr. Emerson employed me and I worked for them. They are here parties to this action. I worked about 8 hours per day. In

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all, I did not lose over a day's time. I worked on the 31st of December, 1898. Not on January 1st, as it was Sunday, I worked January 2nd. Excepting one stormy part of the day I worked the following days of the week. I did not work January 1st, because it was Sunday. Mr. Britton here worked with me twelve days. No one else. I was paid $3 per day for my labor there. I used an ax and shovel cutting brush, and in drift, pick and shovel. The tools belonged to Mr. Emerson and Mr. Britton. I bought them. Paid $1.50 for the ax. While working on the ledge, broke the pick and had it sharpened. It cost nothing to have it fixed at the shop.
202 I am positive that I worked on December 31st, 1898. I am positive of the date.

Cross-examination of J. E. BOYNTON:

I am a mechanical engineer; I live in San Jose. I was running an irrigation pump. I went to the Slap Jack Mine on the 30th day of December, and commenced work there on the 31st day of December, 1898. Mr. Britton and Mr. Emerson sent me there—they told me to cut willows. In a certain place on the mine. Mr. Britton made a map of the location of the mine, and I went up with it. That place was marked on a map of the place, near the east end. Near the southeast end. It would be hard to guess how far from the southeast corner. I know where the center monument is at the east end. Where I was to cut willows is about 100 steps away. It was in a westerly direction from the center monument. It was about 30 or 40 feet from the the lode line. I do not think the ledge is visible at the east end. I suppose the shaft is on the lode line. I know where the shaft is. I should think it (shaft) is about 500 feet from the east end. Where I cut brush was about 300 feet westerly from the east end monument. Looking up the claim it was on the right side. Looking west it will be on the right side. It was level where I cut willows. They didn't state to me any reason why the willows
203 were to be cut. I worked up to January 10th cutting willows. I worked nine days, because I worked the 31st, leaving out Sundays. I cleared off about one-half acre. Grubbed most of them. The ground was nice and cleared up. Some pine, cedar and I think some oaks were left on the ground that I cleared the willows off. Not a great number of trees there. Perhaps 8 or 10. I was not instructed to cut those down. The willows were thick on the level piece of land I spoke of. I trimmed the oak trees. That is about 300 feet from the house above the clearing is very nearer the lode than the house. Part of my clearing is near the lode line, part a little further off. No fence on the mining ground. There is a fence at the road we have to go through, and there is a fence around, but where they connect I do not know. I never engaged in mining work. Not a miner. Britton came there January 10. He got there the night of the 10th, the day I quit cutting brush. I worked under his instructions after that; whatever he wanted done. The first work that we done was to drain a tunnel that is on the mine filled with water backed up in there. Cleaned out the mouth of the tunnel and then let the water out. We worked one day at that. When we started a

drift above the shaft, as you go westerly from the east end of the claim. About 50 feet from the first shaft. We run an open
204 cut about 50 feet. I think we worked there until about the 21st. Continuously excepting Sundays. We commenced that work on the 12th. We worked there from the 12th to the 21st continuously. On January 1st I was on the property excepting a little time when I went down to Groveland for the mail. I did not work on that day. Mr. Britton come on the 10th. Did not work on Sunday. It did not snow during the day, started in the night of January 1st. About three inches of snow fell in all the time. There were two or three inches on the morning of the 2nd. I think that I commenced to cut brush about 8 o'clock on the morning of the 2nd. I lost a few hours that day on account of the storm. I can't tell now what part of the day. The snow didn't stop on the ground, it was the snow falling. I asked no questions as to why I was cutting the brush. I was paid $3.00 per day for cutting willows. I was paid when I returned to San Jose. That was on the 28th. All that I have received from Mr. Britton was $40 so far for my labor up there. He still owes me $23.00. I figured it up before this. I haven't the account with me. I have not yet made a demand for the balance, but I intend to. I would have had the money before, but he had his money in a bank that failed down there to pay. If not for that I should have had my money before this. I don't know when the bank ceased to pay. I cashed my check at the Farmer's Union when I went to San Jose. I could be seen from the house when I
205 was cutting brush, most of the time, not when I was behind bunchy willows. I was working in a southwesterly direction from the house—no, about east. East of the house. And about 200 or 300 paces from the house. No; about 100 paces from the house.

Redirect examination of J. E. BOYNTON:

About a short time previous to coming to the mine I was running an engine. The $20 I spoke of being paid me by Mr. Britton was paid by a check.

Q. Have you received any other money for that work outside of this $15.00 you spoke of first and the $20.00 and the $5.00?

A. Mr. Britton gave me a check just before I came up here of $20.00. I had it cashed.

The COURT: Two checks you got then?

A. Yes, I didn't think of the one just before I came up here.

That made $60 I got from him. And he still owes me $3. The western part of the mine is steep. About 45 degrees. There the brush is thick and there is a ledge of rock. It is rough and steep there.

Mr. STREET: Is not this check you received the other day for the purpose of paying your expenses up here as a witness?

A. No.

Q. You have paid your own expenses up here as a witness?
206 A. I have paid my fare up here, yes. We haven't had a settlement yet, and he paid me this money.

Q. You paid your fare out of this money did you?

A. Yes, sir.

Q. Now, do you mean to say that he only owes you $3 now?

A. Well, as I say, we haven't had a settlement. These things will be brought out. I will be paid for my time there and my fare.

Q. Your time where—time going up there?

A. The time at the mine.

Q. Then when this $20.00 was given you, had you asked him for any money?

A. Yes, I asked him for money. I told him I had to have money to come up here.

Q. He gave you a $20.00 check at that time?

A. Yes, sir.

Q. And you understood at the time it would be towards your expenses up here, didn't you?

A. Yes, sir.

I asked him for money, told him I would have to have money to come up here. And I understood at the time that it was to go towards paying my expenses up here. During the day and a half that I made the drain, Mr. Britton worked with me.

207 F. L. EMERSON, called by plaintiffs, sworn and examined, testified as follows:

I reside at Groveland, Tuolumne County; have lived there a little over two years. I was there during the year 1896. I am a miner. I have been so engaged off and on for the last three years. I was not engaged in the business of mining before that. I know the Slap Jack Mine at Second Garotte. I have known that property since March, 1896. I have done mining work upon it. I am familiar with the nature of the ground upon this mine. I have run open cuts upon ground similar to the Slap Jack Mine, in that neighborhood.

Ques. Do you know the value of mining work in running open cuts upon ground similar to the Slap Jack Mine?

Mr. KENNEDY: We object to that upon the ground that if the plaintiffs desire to prove anything of that kind it was necessary for them to prove it in their case is chief and they have simply rested upon the affidavit which they presented here as being *prima facie* testimony in this case upon the proposition as to what work was done by them during the year 1898 on this claim.

208 The Court overruled the objection to which order and ruling the defendant- then and there excepted.

Ans. Yes, sir. I heard the testimony of Mr. McWhirter yesterday concerning the open cut upon the Slap Jack Mine. I know that open cut.

Ques. State about what would be the reasonable value of running that open cut upon that ground.

Ans. Well, I should put the same work at $75 or $80. That would be reasonable.

Cross-examination of F. L. EMERSON:

This open cut is just above the Slap Jack Mine, the top of the ledge. It is near the center. The cut is from 45 to 60 feet long. It is caved on the sides. It is about 10 or 12 feet wide on the top. I first saw this open cut in 1900. It was more or less caved in then. It is 6 or 7 feet deep. It is about the same width on the bottom, 6 or 7 feet. It would take 25 days, something like that, to run that open cut.

J. B. DOYLE called by plaintiffs, sworn and examined, testified as follows:

I am the County Clerk of Tuolumne County, and have been such since January, 1899. During the month of September, 1901, I was County Clerk of Tuolumne County. This paper you now show me is the judgment roll in the case of Britton *et als. vs.* Hard-
209 inge *et als.* on file in the County Clerk's office in this County. I have a judgment book in which that judgment was entered; it is in the office.

Ques. Turn to the entry in your record of the judgment, Mr. Clerk, and state whether or not the judgment rendered in the case of Britton *et als. vs.* Hardinge *et als.* and of which I have shown you the judgment roll has been satisfied.

Mr. STREET: In behalf of the defendant- I object to the question on the ground that it is immaterial incompetent and irrelevant, in that it is not an issue raised by the pleadings.

The COURT: What is the purpose?

Mr. O'BRIEN: To show that the judgment is final.

Mr. STREET: You have pleaded no estoppel.

Mr. O'BRIEN: Don't have to.

The Court overruled the objection with leave to strike out the testimony to which order and ruling the defendant then and there excepted.

Ans. The case of Briton *vs.* Harding is satisfied.

The COURT: What is the number?

A. 1598.

The COURT: It was satisfied?

A. Yes, sir, it is satisfied.

Mr. O'BRIEN: Mr. Clerk, at the time the decree was entered in the case of Britton *et al. v.* Hardinge *et al.*, No. 1598, state
210 whether or not all moneys called for by the judgment and decree in the case, was deposited with you by the plaintiffs?

A. Yes, sir, $2,400.

Q. $2,400 paid you by whom?

A. By the plaintiffs.

Q. What did you do with the money, Mr. Clerk?

A. I gave it to Mr. Frank Street.

Q. What position did Mr. Street occupy in the case?

A. He was representing the defendants.

Q. That is the Mr. Street who is attorney for the defendant here, the Yosemite Gold Mining and Milling Company?

A. Yes, sir.

Q. At the time the money was paid to you by the plaintiffs did you deliver any paper to the plaintiffs—state whether or not you delivered a Certificate of redemption?

A. I think I did.

Q. State whether or not the certificate of redemption in this case, No. 1598, was deposited with you by the defendants in the case with instructions to deliver it to the plaintiffs upon the payment of the amount of money?

A. Yes, I remember that.

Q. Then state whether or not, when the money was paid to you, you delivered the certificate of redemption?

A. Yes, sir.

211 Thereupon the plaintiffs offered in evidence the judgment roll in the case of Britton *et als. vs.* Hardinge *et als.*, No. 1598, to which offer the defendants then and there objected, upon the ground that it is irrelevant, incompetent and immaterial and not put in issue and raised by the pleadings, and upon the further ground that if it is offered for the purpose of proving an estoppel by judgment it is irrelevant, incompetent and immaterial and should have been pleaded.

The Court overruled the objection with leave to strike out the same, to which order and ruling the defendant then and there excepted.

And thereupon the said judgment was admitted in evidence and was marked plaintiffs' Exhibit "17," and which is in words and figures following to-wit:

212 In the Superior Court of the State of California in and for the County of Tuolumne.

F. F. BRITTON, E. L. EMERSON, and A. L. EMERSON, Plaintiffs,

vs.

H. A. HARDINGE, as Commissioner Appointed by said Superior Court, PETER BERG, and THE YOSEMITE GOLD MINING AND MILLING COMPANY (a Corporation), Defendants.

Now come the plaintiffs in the above entitled action and by leave of the Court first had and obtained, file this their second amended complaint herein, and for cause of action allege:

213 I.

That at all the times herein mentioned the defendant, Yosemite Gold Mining and Milling Company, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and engaged in the business of mining in the County of Tuolumne, State of California.

II.

That at all the times herein mentioned the plaintiffs were, and now are, the owners of those two certain quartz mines and mining properties situate at Second Garotte, southwest of the Big Oak Flat and Yosemite road, in the County of Tuolumne, State of California, and described as follows, to-wit:

An undivided nineteen-twentieths (19-20) interest of, in and to that certain quartz mine and mining property known as and called the "SLAP JACK MINE," being 1500 feet in length and 600 feet in width.

All that certain quartz mine and mining property known as and called the "ORA VISTA QUARTZ MINE," and sometimes called the "Orevesta Quartz Mine," being 1500 feet in length and 600 feet in width.

214 III.

That on or about the 6th day of November, 1899, an action was commenced in the Superior Court in and for the County of Tuolumne, State of California, wherein H. A. Blanchard was the plaintiff and Harry Argall, F. L. Argall, B. Griswold, F. L. Emerson, J. Miller and the plaintiffs herein were the defendants; that said action was brought to foreclose a mortgage executed and delivered to Joseph Marsden upon the premises and property hereinabove described by said Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, which said mortgage was, before the commencement of said action, assigned to said H. A. Blanchard, the plaintiff in said action; that thereafter and on the twenty-third day of February, 1900, said action was regularly tried in the Superior Court in and for the County of Tuolumne, and upon said day the judgment and decree of said Superior Court was duly made, given and rendered therein; that it was adjudged and determined in and by said judgment and decree that Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, some of the defendants in said action, were indebted to H. A. Blanchard, the plaintiff therein, in the sum of $2,076.10, and that said sum was declared and adjudged to be a lien upon the lands and premises hereinabove described; it was also adjudged and determined
215 in and by said judgment and decree that the plaintiffs herein had succeeded to the rights of said mortgagors in said property, and that the plaintiffs herein were the owners of said property, subject to the lien of said mortgage; it also ordered and adjudged in and by said judgment and decree that the said mortgaged property be sold in the manner prescribed by law by H. A. Hardinge, one of the defendants in this action, who was, in and by said judgment and decree, appointed a commissioner of said Superior Court for that purpose; that thereafter and on the first day of March, 1900, the said H. A. Hardinge, qualified as such commissioner, and took the oath of office, and filed with the Clerk of said Superior Court a bond in the sum of $1,000.00, as required by the judgment and decree aforesaid; that thereafter, and on the second day of March, 1900, an order of sale was issued out of said Superior Court in said action di-

rected to H. A. Hardinge, commissioner as aforesaid, commanding him to sell the premises and property described in said order of sale, and in the judgment and decree of foreclosure made, given and entered in said action, and hereinabove described, in the manner provided by law, and to make and file his return of said sale with the Clerk of said Superior Court within thirty days thereafter; that thereafter, and on the 31st day of March, 1900, the said H. A. Hardinge,
as such commissioner, and pursuant to the judgment and de-
216 cree of foreclosure and order of sale aforesaid, sold the lands
and premises described in said judgment and decree of foreclosure and order of sale, and which are the same premises hereinabove described, at public auction, according to law, to Peter Berg for the sum of $2,151.57, in United States gold coin, and thereupon, and on or about said day, he delivered to said purchaser a certificate of sale of said premises and recorded a duplicate thereof in the office of the County Recorder of said County of Tuolumne; that said certificate, so delivered and recorded contained a particular description of the real property sold the price paid for each distinct parcel, the whole price paid, and stated that said real property was sold subject to redemption from the purchaser at any time within twelve months from the date of said sale, and stated the kind of money in which said redemption may be made, which was the same as that specified in said judgment and decree.

IV.

That the plaintiffs herein are the successors in interest of the judgment debtors in said action.

V.

That within twelve months from the date of said sale, and to-wit:
On or about the fifteenth day of March, 1901, the plaintiffs
217 above named as the successors in interest of said judgment
debtors, for the purpose of redeeming the property hereinabove described from said sale, so made by said commissioner as aforesaid, tendered to Peter Berg, the purchaser, at such sale, the amount of his purchase with one per cent. thereon in addition up to and including the 31st day of March, 1901, together with the amount of any and all taxes which he may have paid thereon after purchase, and interest on such amount all in gold coin of the United States, and which was the same kind of money specified in said decree and in said certificate as aforesaid, and then and there demanded from him a certificate of redemption from said sale, but the said Peter Berg then and there refused to accept said moneys, or to execute or deliver to the plaintiffs a certificate of redemption from said sale. That thereafter, and on or about the 15th day of March, 1901, the plaintiffs herein as the successors in interest of said judgment debtors, for the purpose of redeeming the property hereinabove described, from the purchaser of said sale, tendered to H. A. Hardinge, the officer who made said sale, the amount for which said property was sold at said sale, with one per cent. per month thereon in addition up to and including the 31st day of March, 1901, together with the amount

of any assessment or taxes which the purchaser may have
218 paid thereon after purchase and interest on such amount, all in gold coin of the United States, and which was the same kind of money specified in said decree and in said certificate as aforesaid, and then and there demanded from such commissioner a certificate of redemption, showing that the said lands had been redeemed from said sale by them, but the said commissioner then and there refused to accept said moneys, and refused to permit the plaintiffs to redeem the property from the purchaser at said sale, and refused to execute or deliver to the plaintiffs a certificate of redemption from said sale or other evidence showing that a redemption had been made by them from said sale; that thereafter, and within twelve months from the date of said sale, the plaintiffs for the purpose of redeeming said property from said sale made by commissioner, as aforesaid, tendered to the Yosemite Gold Mining and Milling Company a corporation, to whom the defendants, Peter Berg had assigned the certificate of sale issued to him by said commissioner as aforesaid the amount paid by said Peter Berg for said property at said sale, with one per cent. thereon in addition up to and including the 31st day of March, 1901, together with the amount of any and all taxes which said Peter Berg or his assigns, said Yosemite Gold Mining and Milling Company, may have paid thereon after purchase,
and interest on such amount, all in gold coin of the United
219 States, and which was the same kind of money specified in said decree and in said certificate as aforesaid, and then and there demanded from said Yosemite Gold Mining and Milling Company, a corporation, a certificate of redemption from said sale, but the said Yosemite Gold Mining and Milling Company, then and there refused to accept said moneys, and refused to execute or deliver to the plaintiffs a certificate of redemption from said sale.

VI.

That at all the times herein mentioned, since the said 15th day of March, 1901, the plaintiffs have been, and now are ready, willing and able to redeem said property from the sale made to Peter Berg by said commissioner, as aforesaid, and at all of said times they have been, and now are ready, willing and able to do whatever is necessary to be done by them to effect such redemption.

VII.

That the plaintiffs are informed and believe and thereupon allege that the defendants herein have wrongfully and corruptly combined and confederated together for the purpose of preventing the plaintiffs herein from redeeming the property hereinabove described from
said sale, and of thereby defrauding the plaintiffs out of said
220 property, and that the refusal of said Peter Berg, and of the said Yosemite Gold Mining and Milling Company, and of said commissioner to accept from the plaintiffs the moneys necessary to effect a redemption of said property from said sale was, and is, a part of said conspiracy and was done and made for the purpose of wrongfully and corruptly preventing the plaintiff from redeeming said property from said sale, and not otherwise.

VIII.

That the plaintiffs are informed and believe, and therefore allege that the defendant, H. A. Hardinge, is a mere tool and instrument in the hands of the defendant, Peter Berg, and of the officers of the defendant, Yosemite Gold Mining and Milling Company, and that he has, at their behest and as a part of the conspiracy aforesaid, refused to accept the moneys necessary for the plaintiffs to effect a redemption from said sale, solely for the purpose of thwarting the efforts of the plaintiffs to redeem from said sale of said property, and for the purpose of defeating the plaintiffs' right of redemption from said sale, and of thereby depriving the plaintiffs of their said property, and that he will, as plaintiffs are informed and believe and thereupon allege, resort to and do anything which the defendants,
221 Peter Berg, or the officers of the defendant, Yosemite Gold Mining and Milling Company may request him to do in the premises.

IX.

That the plaintiffs are informed and believe, and thereupon allege that the said H. A. Hardinge, as such commisioner, threatens to defeat the efforts of the plaintiffs herein to redeem from said sale until after the time for redemption has expired, and that he will then execute and deliver to the defendant, Peter Berg, or the defendant, Yosemite Gold Mining and Milling Company, a deed, granting and conveying to him or to said corporation, all of the lands and premises described in the certificate of sale aforesaid, and which are hereinabove described and that the plaintiffs are informed and believe, and thereupon allege, that the said H. A. Hardinge, as such commissioner, will wrongfully and corruptly endeavor to defeat the plaintiffs' right to redeem said property from said sale until after the time for redemption has expired, and that he will immediately thereafter, as such commissioner, wrongfully and corruptly execute and deliver to the defendant Peter Berg, or the defendant, Yosemite Gold Mining and Milling Company, a deed to said land and premises, unless he is restrained from so doing by the injunction of this Court.

222 X.

That the acts of the defendants in wrongfully and corruptly combining and confederating together for the purpose of preventing the plaintiffs from redeeming the property hereinabove described from said sale, and of thereby depriving the plaintiff out of their said property, were wanton and malicious, and that by reason of the wrongful acts of the defendants in refusing to permit the plaintiffs to redeem said property from said sale, the plaintiffs were obliged to expend and did expend the sum of $500.00 as necessary expenses in taking the steps required by law to be taken to enable them to effect a redemption of such property from said sale, and that by reason of the premises the plaintiffs have been damaged in the sum of $500.00.

Wherefore, the plaintiffs pray for the judgment and decree of this Court:

1. That they be permitted to redeem said property from said sale upon paying to the purchaser, or his successors in interest, or to said commissioner for said purchaser, or his successors in interest, the amount due upon such redemption, and that the said purchaser, or his successors in interest, or the said commissioner, be required to execute and deliver to the plaintiffs a certificate of redemption, or a conveyance showing that said property has been fully re-
223 deemed from said sale in the manner required by law, within a time to be designated in said decree, and that upon a failure to do so, that an elisor, or a commissioner of this Court be appointed to execute such certificate and conveyance for them.

2. That an injunction be issued restraining the defendant, H. A. Hardinge, from executing and delivering to the defendant, Peter Berg, or to the defendant Yosemite Gold Mining and Milling Company, or to the assignee or successor in interest of either or any of them, any deed or convevance of said property, as such commissioner.

3. For the sum of $500.00 damages.

4. For costs of suit.

5. For such other and further relief as the premises being considered shall to this Honorable Court seem meet and proper.

J. P. O'BRIEN,
CRITTENDEN HAMPTON,
Attorneys for Plaintiff-.

Duly verified by
F. F. BRITTON.

Service of the within admitted by copy this 22nd day of June, 1901.

WILL M. BEGGS,
Attorney for Peter Berg.

Service of the within admitted this 22nd day of June, 1901.

W. C. KENNEDY AND
F. W. STREET,
Attorneys for Yosemite Gold Mining and Milling Company.

W. C. KENNEDY,
Attorney for H. A. Hardinge.

224 Filed June 24th, 1901.

J. B. DOYLE, *Clerk.*

(Title of Court and Cause.)

Come now the defendant- in the above entitled action, and for their answer to plaintiffs' second amended complaint, admit, deny and aver as follows, to-wit:

I.

Deny that the plaintiffs are now or ever were at the times mentioned in plaintiffs' complaint, or at all, the owners of those two cer-

tain quartz mines and mining properties situate at Second Garotte, in Tuolumne County, State of California, and particularly described in paragraph II of plaintiffs' second amended complaint.

II.

These defendants admit that on the 6th day of November, 1899, an action was commenced in the Superior Court in and for the County of Tuolumne, State of California, wherein H. A. Blanchard was plaintiff and Harry Argall, *et als.*, with these plaintiffs were defendants as averred in paragraph III of plaintiffs' complaint, but deny that in said action and in the decree of foreclosure and order of sale entered therein that it was adjudged and determined or
225 adjudged or determined that the plaintiffs herein, or either of them, had succeeded to the rights of the mortgagors in said or any property; or that the plaintiffs herein were the owners of said property, subject to the lien of said mortgage, or at all.

III.

These defendants have no information or belief sufficient to enable them to answer paragraph IV, and therefore, and upon that ground deny that the plaintiffs herein, or any, or either of them, are now, or ever were the successors in interest of the judgment debtors in said or any action.

IV.

These defendants deny that within twelve months from the date of said sale, or at all, the plaintiffs above named, or any of them, as the successors in interest of said judgment debtors, or at all, for the purpose of redeeming said property described in plaintiffs' complaint from said sale, or for any purpose, tendered to Peter Berg, or any one, the amount of his purchase, or any amount with interest at 1 per cent. up to the 31st day of March, 1901, or with any interest up to any date, or at all, together with the amount of any taxes which might have been paid thereon after purchase, or
226 interest on such amount, or at all; deny that on or about the 15th day of March, 1901, or at all, the plaintiffs herein, or either of them, as successors in interest of said judgment debtors, or at all, for the purpose of redeeming the property described in plaintiffs' complaint, or for any purpose, tendered to H. A. Hardinge, as commissioner, or at all, the amount for which said property was sold, or any amount, together with the amount of any assessments or taxes which the purchaser might have paid after said purchase, with interest, or at all; these defendants deny that the plaintiffs or either of them, for the purpose of redeeming said property from said sale, or at all, tendered to the Yosemite Gold Mining and Milling Company, a corporation, the amount paid by Peter Berg, or any amount with 1 per cent. thereon, or any per cent.

V.

These defendants have no information or belief sufficient to enable them to answer, and therefore, and upon that ground deny that at

all the times herein mentioned since the 15th day of March, 1901, or at all, the plaintiffs have been and now are, or ever were, ready, willing and able or ready or willing or able to redeem said property from the sale made to Peter Berg by said commissioner, or at all; and upon the same ground deny that at all or any of said
227 times, or at all, the said plaintiffs have been and now are ready, willing and able, or have been or are now, or ever were, ready or willing or able to do what ever is necessary to be done by them to affect such redemption, or at all.

VI.

These defendants deny that they, or either of them have wrongfully and corruptly or wrongfully or corruptly, or at all, combined and confederated, or combined or confederated together, or at all, for the purpose of preventing the plaintiffs from redeeming the property described in plaintiffs' complaint or for any purpose; and these defendants deny that these plaintiffs were thereby defrauded out of the said or any property, or that they ever have been defrauded out of the said or any property, or at all; deny that the refusal of Peter Berg and of the Yosemite Gold Mining and Milling Company, a corporation, and of the said commissioner, H. A. Hardinge, or either of them, to accept from plaintiffs, or from any one, the moneys necessary to effect a redemption of said property from said sale was and is, or ever was a part of said or any conspiracy and was done and made, or done or made for the purpose of wrongfully and corruptly or wrongfully or corruptly, or at all, preventing the plaintiffs from redeeming said or any property from said sale.

228 VII.

These defendants deny that the defendant, H. A. Hardinge, is a mere tool and instrument or tool or instrument in the hands of the defendant, Peter Berg, or the officers of the defendant, Yosemite Gold Mining and Milling Company, a corporation, or either of them; deny that the said Hardinge has at their behest, or at all, or as a part of the said conspiracy, or any conspiracy, or at all, refused to accept the moneys necessary for the plaintiffs to effect a redemption from said sale solely for the purpose of thwarting the efforts of plaintiffs to redeem from said sale, or at all, or for the purpose of defeating plaintiffs' right of redemption from said sale, or for any purpose, or at all; deny that the said Hardinge will resort to or do anything which the defendant, Peter Berg, or the officers of the said defendant, Yosemite Gold Mining and Milling Company, a corporation, or either of them, may require him to do in the premises, but aver the fact to be that the said H. A. Hardinge was the duly authorized officer appointed to make the sale of the said property and, as such officer, he acted solely as a prudent officer in and about the said proceedings; that as these defendants are informed and believe, and so aver the fact to be, the plaintiffs have not now nor have they ever had the right to redeem the said property described in
229 plaintiffs' complaint; that the said defendant, Hardinge, has no interest in the result of the said redemption or the pro-

ceedings thereunder, or in the foreclosure proceedings, save and except the duty which a prudent officer is bound to exercise in the discharge and conduct of the business for which he was appointed; and that the defendant, Berg, since the assignment of the certificate of sale, as averred in plaintiffs' complaint, has had no interest in the said certificate of sale, or in the proceedings thereunder.

VIII.

The defendants deny that the said H. A. Hardinge, as commissioner, or at all, threatened to defeat the efforts of the plaintiffs, to redeem from said sale the property described in plaintiffs' complaint until after the time for redemption had expired, or at all, and deny that he will then execute and deliver to the defendant, Berg, or the defendant, Yosemite Gold Mining and Milling Company, a corporation, or at all, a deed granting and conveying to either of said parties the land described in plaintiffs' complaint, except as hereinafter averred; and deny that the defendant Hardinge, as such commissioner, or at all, will wrongfully and corruptly, or wrongfully or corruptly, or at all, endeavor to defeat plaintiffs' rights to
230 redeem said property until after the time of redemption has expired; deny that the said Hardinge will wrongfully and corruptly, or wrongfully or corruptly, or at all, execute and deliver or execute or deliver to the defendant, Berg, or the defendant, Yosemite Gold Mining and Milling Company, a corporation, or to any one a deed to said land and premises, or land or premises, unless he is restrained from doing so by the injunction of this Court, except that should the Court decree that plaintiffs are not entitled to redeem he would be in duty bound officially, upon demand therefore, to convey, as such commissioner the said premises to the holder of said certificate.

IX.

These defendants deny that any acts of the defendants, or either of them, have been done either wrongfully and corruptly, or wrongfully or corruptly, or at all, combining and confederating, or combining or confederating together, or at all, for the purpose of preventing plaintiffs from redeeming the property described in plaintiffs' complaint, or at all, or thereby depriving plaintiffs of their property, or at all, were wanton and malicious, or wanton or malicious; deny that by reason of the wrongful acts of the defendants, or of any acts of the defendants in refusing to permit the
231 plaintiffs to redeem said property, or for any other purpose, the plaintiffs were obliged to expend, or did expend the sum of $500.00, or any money whatever, as necessary expenses, or expenses at all, in taking steps required by law to be taken to enable them to effect a redemption of said property from said sale or for any other purpose; or that the said plaintiffs ever expended the said, or any sum; deny that by reason of the premises, or at all, the plaintiffs have been damaged in the sum of $500.00 or any other sum or sums whatever.

Wherefore, these defendants having fully answered plaintiffs com-

plaint pray that the plaintiffs take nothing by this action, and that they be hence dismissed with their costs of suit.

F. W. STREET,
W. C. KENNEDY,
WILL M. BEGGS,
Attorneys for Defendants.

Duly verified by H. A. Hardinge.

Service of the within is hereby admitted this 1st day of July, 1901.

J. P. O'BRIEN AND
C. HAMPTON,
Attorneys for Plaintiffs.

Filed July 1st, 1901.

J. B. DOYLE, *Clerk.*

232 *Decree.*

(Title of Court and Cause.)

The above entitled cause came on regularly for trial on the 5th day of September, A. D. 1901, before the Court sitting without a jury, a trial by jury having been duly waived, Hon. G. W. Nicol, Judge, presiding; Mr. J. P. O'Brien and Mr. Crittenden Hampton appeared as counsel for the plaintiffs, and Mr. F. W. Street appeared as counsel for the defendants.

Whereupon, the defendants offered in open Court, to allow judgment to be taken against them permitting the plaintiffs to redeem the property described in the second amended complaint herein from the foreclosure sale thereof, as prayed for, upon the payment to the Clerk of said Court the sum of $2,440.00 less the costs incurred by plaintiffs in this action, not to exceed the sum of $40.00, and which said offer was also filed with the Clerk of said Court in this action; the plaintiffs thereupon, in open court, accepted the offer so made, as aforesaid, and, in accordance with said acceptance, paid to the Clerk of said Court the sum of $2,440.00 in gold coin of the United States, less the costs incurred by the plaintiffs in prosecuting this action, and which costs were taxed and agreed to by the
233 parties hereto at the sum of $40.00, and which said acceptance was also filed with the Clerk of said Court in this action; the plaintiffs thereupon, in open Court, waived all claim to damages for any of the matters alleged in their second amended complaint herein, and consented to take judgment against defendants for the redemption of said property, from said sale without damages; and said cause having been submitted to the Court for its decision, and the Court having fully considered the same, and all and singular the law and the premises being by the Court seen, heard, understood and fully considered; and findings of fact and conclusions of law having been duly waived by the respective parties hereto in open Court, and entered in the minutes of said Court:

It is therefore, hereby ordered, adjudged and decreed, that the plaintiffs herein have, within the time required by law, fully re-

deemed the lands and premises hereinafter described from the foreclosure sale thereof, made on the 31st day of March, 1900, by H. A. Hardinge, as commissioner appointed by said Superior Court under and in accordance with the decree of foreclosure made, given and entered in said Court on the first day of March, 1900, in an action therein pending, wherein H. A. Blanchard was the plaintiffs, and Harry Argall, F. L. Argall, B. Griswold, F. L. Emerson, J.
234 Miller and the plaintiffs herein were the defendants; that at such sale Peter Berg, one of the defendants herein, became the purchaser of all of the lands and premises hereinafter described for the sum of $2,151.57, and said commissioner thereupon issued and delivered to him a certificate of sale of said lands and premises, and which said certificate of sale was thereafter transferred and assigned to the defendant, Yosemite Gold Mining and Milling Company, a corporation, by said defendant, Peter Berg.

It is further ordered, adjudged and decreed, that the plaintiffs herein redeemed the premises and property hereinafter described from said foreclosure sale as the successors in interest of the judgment debtors in the action aforesaid.

It is further ordered, adjudged and decreed, that the defendant, H. A. Hardinge, as commissioner appointed by said Superior Court, as aforesaid, shall, within ten days from the date hereof, execute and deliver to the plaintiffs herein a certificate of redemption showing that the lands and premsies hereinafter described have been fully redeem-d from said sale by the plaintiffs in the manner required by law, and that upon his failure to do so, that an elisor or a
235 commissioner of this Court be appointed to execute such certificate for him.

It is further ordered, adjudged and decreed, that the plaintiffs herein do have and recover of and from the defendants their costs incurred in this action, and which have been taxed and agreed to by the parties hereto at the sum of $40.00.

The lands and premises herein above referred to and which have been redeemed from the foreclosure sale aforesaid, are described as being those two certain quartz mines and mining properties situate at Second Garotte, southwest of the Big Oak Flat and Yosemite road, in the County of Tuolumne, State of California, and described as follows, towit:

1. An undivided nineteen-twentieth (19-20) interest of, in and to that certain quartz mine and mining property known as and called the "SLAP JACK QUARTZ MINE," being 1,500 feet in length and 600 feet in width.

2. All that certain quartz mine and mining property known as and called the "ORA VISTA QUARTZ MINE," and sometimes called the "Orevesta" Quartz Mine, being 1,500 feet in length and 600 feet in width.

236 Dated this 7th day of September, A. D. 1901.

G. W. NICOL,
Judge of the Superior Court.

Endorsed: Filed September 7, 1901. J. B. Doyle, Clerk. By B. E. Ferguson, Deputy Clerk.

The witness further testified: The papers you now show me are the originals filed in the case of Britton *v.* Hardinge. That is the offer to allow judgment to be taken, and that is the consent of the plaintiffs to take judgment in that case.

The plaintiffs thereupon offered in evidence the offer to the defendants to allow them to take judgment and the consent of the plaintiffs to take judgment in accordance with said offer, to which the defendants made the same objection as that made to the judgment roll, but which objection was by the Court overruled subject to the same right to move to strike out, and to which ruling of the Court defendants excepted.

The said offer of the defendants to allow judgment to be taken against them and the plaintiffs' acceptance of such offer were thereupon introduced in evidence and marked plaintiffs' Exhibit- 18 and 19 respectively, and which are in the words and figures following, to-wit:

237 (Title Court and Cause.)

Offer to Allow Judgment.

To the plaintiffs herein and to their attorneys, J. P. O'Brien and Crittenden Hampton:

You, and each of you will please take notice that the defendants above named offer to allow judgment to be taken against them, permitting the plaintiffs to redeem the property from the foreclosure of the mortgage particularly described in the plaintiff's complaint upon the payment to the Clerk of the above entitled Court of the sum of $2,440, less the costs of this action incurred by the said plaintiffs to date, not to exceed the sum of $40.00.

You will further take notice that there has been deposited with the Clerk of the above Court a certificate of redemption issued by the defendant, H. A. Hardinge, as commissioner, and that the said Clerk has been directed to deliver to you the said certificate of redemption upon the payment of the sum as aforesaid.

Respectfully,

W. C. KENNEDY,
F. W. STREET,
WILL M. BEGGS,
Attorneys for Defendants.

Service of the within is hereby admitted this 1st day of July, 1901.

J. P. O'BRIEN AND
C. HAMPTON,
Att'ys for Plaintiffs.

Endorsed: Filed July 1, A. D., 1901. J. B. Doyle, Clerk.

238 EXHIBIT 19.

(Title of Court and Cause.)

Acceptance of Order to Allow Judgment.

To the defendants in the above entitled action and to Mr. W. C. Kennedy, Mr. F. W. Street, and Mr. William M. Beggs, their attorneys:

You will please take notice, that the plaintiffs in the above entitled action hereby accept the offer made by the defendants, and filed herein, to allow judgment to be taken against said defendants permitting the plaintiffs to redeem the property from the foreclosure of the mortgage described in plaintiffs' amended complaint herein, upon the payment to the Clerk of said Court of the sum of $2,440.00, less the costs in this action incurred by said plaintiffs to date, not to exceed the sum of $40.00.

And you will further take notice, that said plaintiffs have this day, in accordance with said acceptance, paid to the Clerk of said Superior Court the sum of $2,440.00, less the costs incurred by the Plaintiffs in prosecuting this action and which costs have been taxed and agreed to by the parties hereto at the sum of $40.00.

239 Dated this fifth day of September, A. D. 1901.

CRITTENDEN HAMPTON,
J. P. O'BRIEN,
Attorneys for Plaintiffs.

Service of the within admitted by copy the 5th day of September, 1901.

W. M. BEGGS,
W. C. KENNEDY AND
F. W. STREET,
Attorneys for Defendants.

Endorsed: Filed September 5, 1901. J. B. Doyle, Clerk. By B. E. Ferguson, Deputy Clerk.

It is admitted that they are the original offer and acceptance.

Thereupon the plaintiffs offered in evidence the satisfaction of judgment in Docket "E," subject to the same objection, ruling and exception which was admitted in evidence and marked plaintiffs' Exhibit "20." This shows the judgment was fully satisfied.

Thereupon the plaintiffs offered in evidence subject to the
240 same objection, ruling and exception, the certificate of redemption which was admitted in evidence and marked plaintiffs' Exhibit "21," which is as follows:

241 No. 1397.

In the Superior Court of the State of California in and for the County of Tuolumne.

H. A. BLANCHARD, Plaintiff,

vs.

B. GRISWOLD, F. L. EMERSON, E. L. EMERSON, F. F. BRITTON, A. L. EMERSON, HARRY ARGALL, F. L. ARGALL, and J. MILLER, Defendants.

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

I, H. A. Hardinge, commissioner appointed by the Superior Court in the above entitled action, do hereby certify that for and
242 in consideration of the sum of $2,440.00 lawful money of the United States of America to me in hand paid, the receipt whereof is hereby acknowledged, that that certain mortgage heretofore executed by Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, which mortgage is of record in Book "B," Vol. 34, page 15 of Mortgages, records of Tuolumne County, California, and the judgment and decree of foreclosure entered in the above entitled action on February, 1900, in Judgment Book "E," at page 429, of record in the County Clerk's office in the said County of Tuolumne, has been fully paid, satisfied and discharged.

I further certify and declare that the said sum of $2,440.00 was paid to me by F. F. Britton, E. L. Emerson, and A. L. Emerson, plaintiffs in the action filed in the above entitled Court on March 27th, 1901, by the said F. F. Britton, E. L. Emerson and A. L. Emerson *vs.* H. A. Hardinge, Peter Berg and the Yosemite Gold Mining and Milling Company, a corporation.

H. A. HARDINGE,
As Commissioner.

(Duly acknowledged.)

Recorded at the request of J. P. O'Brien, January 20th, 1902, at 40 minutes past 4 o'clock p. m., in Book D, Vol. 2, page 19,
243 of Certificate of Sale, Tuolumne County Records.

R. INCH,
County Recorder.

Thereupon plaintiffs rested.

WALTER J. COYLE, recalled by defendants, testified as follows:

I have heard the testimony in regard to an open cut made in the spring of 1899 by Mr. Britton and Mr. Boynton. The dimensions are about six feet wide and between 45 and 50 feet long and six feet deep at the upper end, while it started at the surface at the lower end. At the center it had a depth of about 4 or 5 feet. The cut was north of the ledge in loam soil. I am a practical miner and have made similar cuts to this. The reasonable value of the work performed at that time on this cut is about $45 or $50, I think.

Cross-examination of WALTER J. COYLE:

I did not make any measurements of that open cut. The soil in this cut was loam on the top and clay at the bottom that clay is pretty hard to work when it gets wet, it is pretty hard picking ground. That open cut was run in winter time, in January, the ground was wet, and shoveling would be softer than in the
244 summer time. The clay below would be heavier work. I have run similar cuts to this.

E. M. ELWELL, recalled by the defendants, sworn and examined, testified as follows:

I was living on the Slap Jack Mine in January, 1899. I moved away from there in August or September. I have heard the testimony in regard to the open cut. It commenced from the surface in an old cut that had been washed out and run in a depth of probably 5 feet. The length of the cut was somewhere, I judge, 45 or 50 feet. The width was about six feet, not over. The cut was eight to twelve feet from the ledge. It was loamy soil, heaviest kind of loam, and the bottom of the cut was clay. I am a practical miner and never had much experience in making cuts of this character. I have done pick and shovel work in different kinds of ground. Never done much in such ground as that. I have done considerable in building roads, digging ditches and prospecting. From my experience as a miner and worker of the soil I would say that it was reasonably worth the sum of $40 or $45 to do this work in this cut.

245 Cross-examination of E. M. ELWELL:

I have never made any measurement of this cut. My figures are simply an estimate. When I say it is about 45 feet long and about six feet wide that is simply my estimate from seeing it. At no time did I make any measurement of it. The bottom of this cut is clay. After the subsoil is removed, the bottom is quite hard, that would require considerable picking, in fact, it would be all picking. The top is loose soil. I have done work in such clay as that.

Q. Mr. Elwell, did you ever make an open cut in soil of that kind, or formation of that kind, of those dimensions?

A. I don't think I ever did.

And thereupon the defendant moved the Court to strike out the judgment roll offered by the plaintiffs in the case of Britton *et als. vs.* Hardinge *et als.*, No. 1598, plaintiffs' Exhibit 17, the offer and consent marked plaintiffs' Exhibit "18" and "19." The judgment docket marked plaintiffs' Exhibit "20," and the certificate of redemption marked plaintiffs' Exhibit "21" together with the evidence of the witness J. B. Doyle, given in connection with said exhibit, on the ground that the same were incompetent, immaterial and irrelevant in this case and not within any issue raised by the
246 pleadings, and are not plead in estoppel herein, and are not *res adjudicata* of any question at issue in this case, in this that

the judgment is not between the same parties as in this case, nor is it about the same subject matter, nor of the matters in litigation in this case.

The Court denied the motion, to which order and ruling the defendant- then and there excepted.

This was the substance of all the evidence introduced to the Court and thereafter the case was argued and submitted to the Court for its decision, and thereafter the Court made and filed its Findings of Facts and Conclusions of Law and judgment in favor of the plaintiffs and against the defendants.

Thereafter and within the time prescribed by the Statutes the defendant served and filed its Notice of Intention to move the Court to set aside and vacate the decision herein and to grant a new trial of said cause upon the following grounds, to-wit:

I.

Accident and surprise which ordinary prudence could not have guarded against.

II.

Newly discovered evidence material for the said defendant which it could not with reasonable diligence have discovered and produced at trial.

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III.

Insufficiency of the evidence to justify the findings and decision of the Court.

IV.

That said decision is against law.

V.

Errors in law occurring at the trial and excepted to by the defendant.

Said defendant within due and proper time thereafter, and within the time allowed by law and the order of the Court, and pursuant to its said Notice of Intention, prepared its statement of the case on motion for a new trial and duly served the same upon plaintiffs' counsel and their defendants in proper time. And thereafter and in due time said statement of the case was presented to the Court for settlement with due notice to plaintiffs and their counsel.

Errors in Law.

The defendant, Yosemite Gold Mining and Milling Company here and now specifies the errors in law occurring at said trial and excepted to by it and upon which it relies:

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I.

The Court erred in overruling the objections of the defendant to the introduction of plaintiffs' Exhibit "1," notice of the location of

Walter J. Coyle, and in admitting the same in evidence over said defendant's objections, and here and now assign the same as error.

II.

The Court erred in overruling the objections of the defendant to the introduction of the plaintiffs' Exhibit "2," notice of the location of Walter J. Coyle, and in admitting the same in evidence over said defendant's objections, and here and now assign the same as error.

III.

Said Court erred in admitting in evidence the grant, bargain and sale deed, plaintiffs' Exhibit 3, from Walter J. Coyle to Harry Argall, *et als.*, dated August 6th, 1896, and recorded in Vol. 31 Book "A" of Deeds, page 275, Tuolumne County Records, over the objection and exception of the defendant.

IV.

The Court erred in admitting the deeds, plaintiffs' Exhibits, 4 to 12 inclusive over the objection and exception of said defendant.

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V.

The Court erred in admitting in evidence over the objection and exception of the defendant the Proof of Labor filed in the County Recorder's office of Tuolumne County, December 27th, 1898, and being plaintiffs' Exhibit "13," and here and now assign the same as error.

VI.

The Court erred in admitting in evidence the Proof of Labor filed January 27th, 1899, and marked plaintiffs' Exhibit "14," over the objection and exception of the defendant and here and now assigns the same as error.

VII.

The Court erred in admitting in evidence over the objection and exception of the defendant the Notice, dated December 18th, 1899, and being plaintiffs' Exhibit "15," and here and now assigns the same as error.

VIII.

The Court erred in overruling the objection of defendant to the question propounded to the witness Argall and permitting him to answer thereto upon the direct examination "What is your
250 best judgment?" To which the defendant then and there duly excepted and here and now assigns the same as error.

IX.

The Court erred in overruling the objection of the defendant to the question propounded to the witness F. L. Argall and permitting him to answer thereto upon the direct examination, to-wit: "What, if

anything, was said to you at that time by either of them about the Notice?" To which the defendant then and there excepted and here and now assigns the same as error.

X.

The Court erred in permitting the question to be propounded to the witness F. F. Britton and admitting his answer thereto, over the objection and exception of the defendant, to-wit: "Has any of the successors in interest of the Argalls or either of them contributed or paid such proportion of that assessment work?" And the said defendant here and now assigns the same as error.

XI.

The Court erred in overruling the objection of the defendant to the question propounded to the witness F. F. Britton, "Did
251 you perform any labor upon the Slap Jack Mine during the year 1898?" and permitting him to answer thereto, and said defendant here and now assign- the same as error.

XII.

The Court erred in overruling the objection of the defendant to the question propounded to the witness F. L. Emerson, "Do you know the value of mining work in running open cuts upon ground similar to the Slap Jack Mine?" And permitting the witness to answer thereto, to which order and ruling the defendant then and there excepted and here and now assigns the same as error.

XIII.

The Court erred in overruling the objection of the defendant to the question propounded to the same witness, "State about what would be the reasonable value of running that open cut upon that ground?" And permitting the witness to answer thereto, to which the defendant then and there excepted and here and now assign- the same as error.

XIV.

The Court erred in overruling the objection of the defendant to the question propounded to the witness J. B. Doyle, "Turn to
252 the entry in your record of the judgment, Mr. Clerk, and state whether or not the judgment rendered in the case of Britton *et als. vs.* Hardinge *et als.*, and of which I have shown you the judgment roll, has been satisfied?" And in permitting the witness to answer, to which the defendant then and there duly excepted and here and now assigns the same as error.

XV.

The Court erred in overruling the objection of the defendant to the admission in evidence of the judgment roll in the case of Britton *et als. vs.* Hardinge *et als.*, No. 1598, being plaintiffs' Exhibits "17," "18" and "19," to which the defendant then and there duly excepted and here and now assigns the same as error.

XVI.

The Court erred in overruling the objection of the defendant in admitting in evidence the Satisfaction of Judgment in docket "E," being plaintiffs' Exhibit "20," to which the defendant then and there duly excepted, and here and now assigns the same as error.

XVII.

The Court erred in admitting in evidence over the objection of the defendant the Certificate of Redemption, being plaintiffs' Ex-
253 hibit "21," to which the defendant then and there excepted and here and now assigns the same as error.

XVIII.

The Court erred in denying the motion of the defendant to strike out the Judgment Roll of the case of Britton *et als. vs.* Hardinge *et als.*, No. 1598, plaintiffs' Exhibit "17," and plaintiffs' Exhibit "18" and "19," "20" and "21," together with the evidence of the witness Doyle given in connection with said exhibits, to which ruling the defendant then and there excepted, and now assigns the same as error.

Insufficiency of the Evidence.

The defendant specifies the following particulars in which the evidence is insufficient to sustain the decision herein:

I.

The evidence is insufficient to justify the decision of the Court contained in Finding 4 of the Finding of Facts:

1. That upon January 1st, 1896, Walter J. Coyle located and appropriated the vein or lode within the boundaries of the Slap
254 Jack Mine as and for a quartz mining claim.

2. That he posted thereon his notice of location at the east end of the lode line.

3. That he marked said claim on the ground so that the boundaries thereof could be readily traced.

II.

The evidence is insufficient to justify the decision of the Court contained in Finding 5 of the Finding of Fact herein:

1. That on the 6th day of August, 1896, said Walter J. Coyle executed and delivered to Argall *et al.* a deed whereby he granted and conveyed to them all of the Slap Jack Mining Claim located by him.

2. That on January 2nd, 1897, F. L. Argall and Harry Argall executed and delivered to Jacob Miller their deed wherein and whereby they granted and conveyed to the said Jacob Miller an undivided one-twentieth (1-20) interest of in and to said mine.

3. That on November 24th, 1898, Benson Griswold executed and delivered to plaintiff F. F. Britton his deed of an undivided one-sixth (1-6) interest in said mine.

4. That Benson Griswold executed and delivered to W. W.
255 Gray his deed to an undivided one-twelfth (1-12) interest in said mine.

5. That on September 18th, 1898, F. L. Emerson executed and delivered to Annie L. Emerson his deed of an undivided one-fourth (1-4) interest in said mine.

6. That W. W. Gray executed and delivered on November 12th, 1898, his deed to E. L. Emerson of an undivided one-twelfth (1-12) interest in said mine.

7. That upon May 2nd, 1900, E. L. Emerson executed and delivered to F. F. Britton his deed to all his interest in said mine and mining property.

III.

The evidence is insufficient to justify the decision of the Court contained in Finding 6 of the Findings of Fact.

1. That during the year 1898, the plaintiff performed $84.90 worth of labor upon said mine and mining claim.

2. That on the 31st day of December, 1898, the plaintiffs resumed work upon said mine and mining claim.

3. Plaintiffs resumed work upon said mine and mining claim and prosecuted said work diligently thereafter until more than
256 $100.00 worth of labor and improvements were performed thereon, in addition to the labor performed during the year 1898.

IV.

The evidence is not sufficient to justify the decision of the Court contained in Finding 9 of the Findings of Fact herein:

1. That A. L. Emerson, F. F. Britton and Jacob Miller and their grantors have worked and operated said mine and mining claim in good faith and without any intention of abandoning the same.

V.

The evidence is insufficient to justify the decision of the Court contained in Finding 10 of the Findings of Fact herein:

1. That R. S. McWhirter, the grantor and predecessor in interest of the defendant Yosemite Gold Mining and Milling Company attempted to locate the ground included within the limits of the Slap Jack Mining Claim located by Walter J. Coyle.

2. That he caused $50.00 worth of labor to be performed upon said claim in the development of his alleged discovery thereof.

3. That there was posted thereon on the first day of January, 1899, the alleged preliminary Notice of Location.

257 VI.

The evidence is insufficient to justify the decision of the Court contained in Finding 11 of the Findings of Fact herein:

1. That at the time of the attempted location of said ground by the said R. S. McWhirter, the lands and premises sought to be located by him were not open public mineral lands of the United States.

2. That they were not open to location or purchase by the said R. S. McWhirter or any other person.

3. That said lands were at that time the property of plaintiffs and of the defendants, Harry Argall and F. L. Argall.

4. That the said Slap Jack Mining Claim was at that time and at all times herein mentioned since the first day of January, 1896, has been and now is a valid subsisting mining claim.

VII.

That the evidence is insufficient to justify the decision of the Court contained in Finding 12 of the Findings of Fact herein:

1. That it was adjudged and determined by the judgment and decree in the action of H. A. Blanchard *vs.* Argalls *et als.*, that the plaintiffs E. L. Emerson, Mrs. A. L. Emerson and F. F. Brit-
258 ton had succeeded to the rights of said mortgagors in said property.

2. That the said plaintiffs, E. L. Emerson and Mrs. A. L. Emerson and F. F. Britton were adjudged and determined in and by said judgment and decree to be the owners of an undivided nineteen-twentieths (19-20) interest in said Slap Jack Mining Claim.

3. That on or about the 15th day of March, 1901, the plaintiffs E. L. Emerson, Mrs. A. L. Emerson and F. F. Britton as successors in interest of said judgment debtors, tendered to Peter Berg the amount of his purchase, with one per cent. per month thereon up to and including the 31st day of March, 1901, together with the amount of any and all taxes which the purchaser may have paid thereon after purchase, and the interest on such amount all in gold coin of the United States, and then and there demanded from him a certificate of redemption from such sale, and that said Berg then and there refused to accept said money or execute a certificate of redemption.

4. That on the 7th day of September, 1901, a judgment and decree was made, given and rendered in this Court in said redemption suit, wherein and whereby it was adjudged that the plaintiffs F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson had, within
259 the time required by law, fully redeemed the said "Slap Jack Mining Claim" from the foreclosure sale thereof made on the 31st day of March, 1900. That it was adjudged and determined by this Court in and by said judgment and decree, that the plaintiffs, F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson had redeemed said Slap Jack Mining Claim from the foreclosure sale thereof as the successors in interest of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson.

5. That the Slap Jack Mining Claim involved in this action is the same mine and mining property that was involved in the redemption suit aforesaid, and that the Yosemite Gold Mining and Milling Company, a corporation, who is one of the defendants in this case, was also one of the defendants in said redemption suit.

6. That the question of the ownership of the 19-20 interest of in and to said Slap Jack Mining Claim and the question of who were the successors of interest therein of Harry Argall, F. L. Argall, B.

Griswold and F. L. Emerson, was involved and was a material issue in said redemption suit.

7. That it was adjudged and determined by this Court in and by this judgment and decree, made, given and rendered in said redemption suit, that the plaintiffs F. F. Britton, E. L. Emerson and Mrs. A. L. Emerson were the owners of the said 19-20 interest of
260 in and to said Slap Jack Mining Claim, and that they were the successors in interest of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson.

VIII.

That the evidence is insufficient to justify the decision of the Court contained in Findings 13 of the Findings of Fact herein:

1. That the plaintiffs, F. F. Britton, Mrs. A. L. Emerson and Jacob Miller are now the owners of and entitled to the possession of the mine and mining property herein described and referred to.

2. That the plaintiffs, F. F. Britton and Mrs. A. L. Emerson are each the owners of an undivided (19-40) nineteen-fortieths, interest therein, and that the plaintiff, Jacob Miller is the owner of an undivided one-twentieth (1-20) interest therein.

IX.

That the evidence is insufficient to justify the decision of the Court contained in Finding 14 of the Findings of Fact herein:

1. That the defendants are not and each of them is not, the owners of, or entitled to the possession of any part of the lands, premises and mining property described in the pleadings herein.

2. That said defendants, nor either of them, have any
261 right, title or interest therein.

The defendant assigns the following particulars in which said decision is against law:

I.

The decision of the Court contained in Finding 4 of the Findings of Fact is against law:

1. That upon January 1st, 1896, Walter J. Coyle located and appropriated a vein or lode within the boundaries of the Slap Jack Mine as and for a quartz mining claim.

2. That he posted thereon his notice of location at the east end of the lode line.

II.

That the decision of the Court contained in Finding 5 of the Findings of Fact herein is against law.

That on the 6th day of August, 1896, said Walter J. Coyle executed and delivered to the Argalls *et als.*, a deed whereby he granted and conveyed to them all of the Slap Jack Mining Claim located by him.

III.

The decision of the Court contained in Finding 6 of the Findings of Fact is against law.

1. That during the year 1898, the plaintiffs performed $84.90 worth of labor upon said mine and mining claim.

262 2. That on the 31st day of December, 1898, the plaintiffs resumed work upon said mine and mining claim.

3. That plaintiffs resumed work upon said mine and mining claim and prosecuted said work diligently until more than $100.00 worth of labor and improvements were performed thereon in addition to the labor performed during the year 1898.

IV.

The decision of the Court contained in Finding 9 of the Findings of Fact herein is against law.

That A. L. Emerson, F. F. Britton and Jacob Miller and their grantors have worked and operated said mine and mining claim in good faith and without any intention of abandoning the same.

V.

The decision of the Court contained in Finding 10 of the Findings of Fact herein is against law.

1. That R. S. McWhirter, the grantor and predecessor in interest of the defendant, Yosemite Gold Mining and Milling Company attempted to locate the ground included within the limits of the Slap Jack Mining Claim.

2. That he caused $50.00 worth of labor to be performed upon said claim in the development of his alleged discovery thereof.

263 3. That there was posted thereon on the first day of January, 1899, the alleged preliminary Notice of Location.

VI.

The decision of the Court contained in Finding 11 of the Findings of Fact herein is against law.

1. That at the time of the attempted location of said ground by the said R. S. McWhirter, the lands and premises sought to be located by him were not open public mineral lands of the United States.

2. That they were not open to location or purchase by the said R. S. McWhirter or any other person.

3. That said lands were at that time the property of plaintiffs and of the defendants, Harry Argall and F. L. Argall.

4. That said Slap Jack Mining Claim was at that time and at all the times herein mentioned since the first day of January, 1896, has been and now is a valid and subsisting mining claim.

VII.

The decision of the Court contained in Finding 12 of the Findings of Fact herein is against law.

1. That it was adjudged and determined by the judgment and decree in the action of Blanchard *vs.* Argalls *et als.*, that the

264 plaintiffs Emerson, Emerson and Britton had succeeded to the right of said mortgagors in said property.

2. That the said plaintiffs Emerson, Emerson and Britton were

adjudged and determined in and by said judgment and decree to be the owners of an undivided nineteen-twentieths interest in said Slap Jack Mining Claim.

3. That it was adjudged and determined by this Court in and by said judgment and decree, that the plaintiffs, Britton, Emerson and Emerson had redeemed said Slap Jack Mining Claim from the foreclosure sale thereof as the successors in interest of Argall, Argall, Griswold and Emerson.

4. That the question of ownership of the 19-20 interest of, in and to said Slap Jack Mining Claim and the question of who were the successors in interest therein of Argall, Argall, Griswold and Emerson was involved and was a material issue in said redemption suit.

VIII.

That the decision of the Court contained in Finding 13 of the Findings of Fact herein is against law.

1. That the plaintiffs Britton, A. L. Emerson and Jacob Miller are now the owners of and entitled to the possession of the mine and mining property herein described and referred to.

265 2. That the plaintiffs, Britton and A. L. Emerson are each the owners of an undivided 19-40 interest therein, and that the plaintiff Jacob Miller is the owner of an undivided 1-20 interest therein.

IX.

That the decision of the Court contained in Finding 14 of the Findings of Fact herein is against law.

1. That the defendants are not and each of them is not the owners of, or entitled to the possession of any part of the lands, premises and mining property described in the pleadings herein.

2. That the said, defendants, nor either of them have any right, title or interest therein.

X.

That the decision of the Court contained in the Conclusions of Law 2 of the Findings herein is against law.

1. That the defendants have not, and each of them have not any right, title or interest or estate in or to the lands, premises and mining property herein described and referred to, or any part thereof.

2. That the defendants are not, and each of them is not entitled to the possession thereof.

266 XI.

That the decision of the Court contained in the Conclusions of Law 3 in Findings herein is against law.

1. That at the time of the attempted location of said land by R. S. McWhirter, the grantor and predecessor in interest of the defendant, Yosemite Gold Mining and Milling Company, as aforesaid, the lands and premises sought to be located by him were not vacant public mineral lands of the United States and were not subject to location by said R. S. McWhirter, or any other person, but

that said land was at that time, and at all the times herein mentioned since the first day of January, 1896, has been and now is, included within the Slap Jack Mining Claim and that the right, title and interest of the plaintiffs to said Slap Jack Mining Claim has not been forfeited.

XII.

That the decision of the Court contained in the Conclusions of Law 5 of Findings herein is against law.

1. That the question of ownership of the 19-20 interest of, in and to said Slap Jack Mining Claim, and the question of who were the successors in interest in said mining claim of Harry Argall,
267 F. L. Argall, B. Griswold and F. L. Emerson was involved and was a material issue in the redemption suit prosecuted in this Court by the plaintiffs, Britton, Emerson and Emerson against the defendant, Yosemite Gold Mining and Milling Company.

2. That it was adjudged and determined by this Court in and by the judgment and decree made, given and rendered in said redemption suit, that the plaintiffs, Britton, Emerson and Emerson were the owners of 19-20 interest of, in and to said Slap Jack Mining Claim, and that they were the successors in interest in said mining claim of Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson, the judgment debtors in the foreclosure action aforesaid.

3. That said judgment and decree is a final and conclusive determination of both of these questions aforesaid.

4. That said judgment and decree is a complete bar to the further litigation of either of such questions.

5. That the defendant, Yosemite Gold Mining and Milling Company is now estopped by said judgment and decree from disputing the ownership of the plaintiffs to said 19-20 interest of, in and to said Slap Jack Mining Claim.

268 XIII.

That the decision of the Court contained in the Conclusions of Law 6 of the Findings herein is against law.

1. That the plaintiffs are entitled to a decree of this Court quieting their title to all of the lands, premises and mining property described in the pleadings herein.

2. That all persons claiming or to claim the same or any part thereof, under or through the said defendants, or either of them be enjoined and debarred from asserting any title thereto, adverse to the plaintiffs.

XIV.

The decision of the Court contained in Conclusions of Law 7 of the Findings herein is against law.

That plaintiffs are entitled to judgment against the defendants for their costs incurred herein.

I hereby certify that the foregoing statement is a true and correct statement of the proceedings had before me in the action of E. L.

Emerson *et als. vs.* Yosemite Gold Mining and Milling Company, *et als.*, No. 1313, and the foregoing statement is this day allowed and is correct.

G. W. NICOL, *Judge.*

Dated October 3rd, 1902.

269 *Order Denying Motion for New Trial.*

[Title of Court and Cause.]

In the above entitled action J. P. O'Brien and Crittenden Hampton, Esqs., appeared for the plaintiffs, W. C. Kennedy and W. M. Beggs, Esqs., appeared for the defendants.

W. C. Kennedy, Esq., one of the attorneys for the defendants, at this time moves the Court, to set aside and vacate the judgment and decision heretofore rendered and entered herein, and to grant the said defendant- a new trial of said cause, on the following grounds, to-wit:

I.

Accident and surprise which ordinary prudence could not have guarded against.

II.

Newly discovered evidence, material for the said defendants, which *it* could not with reasonable diligence have been discovered and produced at the trial.

III.

Insufficiency of the evidence to justify the findings and decision of the Court.

270 IV.

That said decision is against law.

V.

Errors in law occurring at the trial and excepted to by the Defendants.

Said motion for new trial denied and overruled.

Notice of Appeal.

[Title of Court and Cause.]

To E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, and Jacob Miller, plaintiffs in the above entitled action, and to their attorneys, J. P. O'Brien and Crittenden Hampton, and to the defendants, Harry Argall and F. L. Argall, and to their attorney, Will M. Beggs:

You and each of you will please take notice that the defendant, Yosemite Gold Mining and Milling Company, a corporation, hereby appeals to the Supreme Court of the State of California, from the

judgment therein entered in the above Superior Court on the 25th day of June, 1902, in favor of the above plaintiffs in said action and against these defendants, and from the whole thereof.

You and each of you are further notified that the defendant, Yosemite Gold Mining and Milling Company, a corporation, also hereby appeals to the Supreme Court of the State of Califor-
271 nia, from an order given and made on December 22, 1902, by the above entitled Court in said action, denying said defendant's motion for a new trial and from the whole of said order.

Very respectfully,

W. C. KENNEDY,
WILL M. BEGGS,
F. W. STREET,
Attorneys for Appellant.

Received a copy of the within this 22nd day of December, 1902.

J. P. O'BRIEN AND
CRITTENDEN HAMPTON,
Attorneys for Plaintiffs.

Received copy of the within notice of appeal this 22nd day of December, 1902.

WILL M. BEGGS,
Attorney for Defendants Argalls.

Filed this 22nd day of December 1902.

J. B. DOYLE, *Clerk,*
By B. E. FERGUSON,
Deputy Clerk.

272 [Title of Court and Cause.]

STATE OF CALIFORNIA, *County of Tuolumne, ss:*

Clerk's Certificate.

I, J. B. Doyle, County Clerk and *ex-officio* Clerk of the Superior Court of the State of California, in and for the County of Tuolumne, do hereby certify the foregoing printed transcript on appeal to be correct, and that the transcript contains full, true, and correct copies of all the papers, files and endorsements, thereon, minutes of the Court, the Judgment and Decree constituting the Judgment Roll in said action Number 1313, entitled E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, plaintiffs, *vs.* Yosemite Gold Mining and Milling Company, a corporation, (substituted for R. S. McWhirter,) Harry Argall and F. L. Argall, defendants, the statement on motion for a new trial, the order denying the motion for a new trial and the notice of appeal therein.

I hereby certify that a sufficient undertaking on appeal from said Judgment and Decree and for a stay of execution of the same,
273 and also a sufficient undertaking on appeal from the order refusing to grant appellant a new trial in due form of law and

in the amounts required by law, conditioned as provided by law in such cases was properly and legally filed herein within five days after the notice of appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Superior Court of the State of California, in for the County of Tuolumne this 30th day of January, 1903.

J. B. DOYLE, *Clerk*,
[SEAL.] By B. E. FERGUSON.

[Title of Court and Cause.]

274 Filed Mar. 27, 1906. Frank C. Jordan, Clerk, by —— Erb, Deputy.

In Bank.

Sac. No. 1142.

E. L. EMERSON ET AL., Plaintiffs and Respondents,
v.
YOSEMITE GOLD MINING AND MILLING COMPANY, Defendant and Appellant; HARRY ARGALL ET AL., Defendants.

This is an action to quiet title to a mining claim in Tuolumne County, called the Slap Jack Mine. Judgment went for the plaintiffs, and defendant Yosemite Gold Mining and Milling Campany appeals from the judgment and an order denying its motion for a new trial.

This is the second appeal in this cause. (See Emerson *et al., v.* McWhirter, *et al.* 133 Cal. 510.) Upon the first trial, judgment was given in favor of defendant McWhirter, and on the appeal therefrom this judgment and an order denying plaintiffs' motion for a new trial were reversed. Upon the going down of the remittitur, the Yosemite Gold Mining and Milling Company, claiming to be the successor in interest of defendant McWhirter, and defendants Argall was substituted for "R. S. McWhirter, *et als.*," as defendant.

Plaintiffs base their claim upon a location made by one Coyle in January, 1896.

The claim of defendants Argall, which embraced an undivided nine-twentieths of the property, was based on the same location, and by deed dated May 31, 1899, said Argalls purported to grant to appellant's immediate predecessor, all their interest in said property.

The claim of defendant McWhirter, succeeded to by appellant corporation, was based upon an attempted location by McWhirter on January 1, 1899, a few minutes after midnight, made by him upon the theory that plaintiffs had failed to perform the assessment work for the year 1898.

275 It is first contended by appellant that Coyle never made a valid location, because he posted but one notice of location on the claim, while the local regulation of the miners of Tuolumne County required two such notices to be posted.

The same contention was made upon the former appeal, was there fully discussed and decided adversely to appellant's claim. What was there said in this matter is now the law of this case.

The second and third points made by appellant relate to the question of the sufficiency of the evidence to support the findings of the court as to the doing by the plaintiffs of the assessment work for the year 1898.

The court found "That during the year 1898, the plaintiffs performed $84.80 worth of labor upon said mine and mining claim; that on the 31st day of December, 1898, the plaintiffs resumed work upon said mine and mining claim, and prosecuted said work diligently thereafter until more than $100.00 worth of labor and improvements were performed and made thereon, in addition to the labor performed during the year 1898, as aforesaid."

Upon the former trial, the court found that the assessment work for 1898, had not been performed, and that the land was, therefore, on January 1, 1899, public mineral land, open to location, and McWhirter's attempted location on that day consequently valid. The judgment then given was reversed upon the ground that, conceding that the requisite one hundred dollars' worth of labor had not been done during the year 1898, the evidence showed that some work had been done in good faith during that year, and that on December 31, 1898, prior to McWhirter's attempted location, work was resumed thereon in good faith by plaintiffs, and continuously carried on thereafter, to some time late in January, 1899, until more than one hundred dollars' worth of work, in addition to that done during 1898, had been done.

Section 2324 U. S. Revised Statutes providing that on a
276 failure to comply with the conditions as to doing the requisite work, the mine "shall be open to relocation in the same manner as if no location of the same had ever been made, *provided, the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location,*" it was held by this court thereunder that the resumption of work on December 31, 1898, and the continuance thereof to the requisite amount, prevented a forfeiture, and that McWhirter's attempted location at a time during which plaintiffs were in possession engaged in the continuance of such work, was unavailing.

It can not be seriously contended that the evidence given upon the second trial was substantially different from that given on the first trial as to the character of the work, and the amount thereof. Under the views expressed on the former trial, which must be accepted here as the law of the case, the only point upon which there may be a question at all, so far as the finding of the court is concerned, is as to whether plaintiffs resumed work on December 31, 1898, or not until January 2, 1899. Upon this point, however, there can be no real question here, for there was a clear conflict in the evidence. There was added to the testimony given on the former trial, that of two new witnesses, who testified positively that Boynton, who commenced the work, did not arrive at the mine until late in the afternoon of December 31st, and that he did no work at all that day.

On the other hand, Boynton testified positively that he arrived at the mine on December 30th, and commenced his work the next day. As to the time of his arrival, he was corroborated by another witness, who accompanied him there, and who was positive as to the date. The evidence of the other witnesses for appellant upon this subject was not materially different from that given by them upon the former trial, where it was held not to be sufficient to even raise a substantial conflict.

There was, as shown above, a substantial conflict in the evidence upon this matter on the second trial, but that is the most that
277 can be said for appellant. It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal. These are the only points made in relation to the McWhirter interest, and it thus appears that so far as appellant claims under McWhirter, the judgment in favor of plaintiffs was correct.

The remaining points relate to the Argall nine-twentieths interest.

This action was commenced February 10, 1899, and it was alleged in the original complaint that the Argalls were, with plaintiffs and one other defendant, the owners of all the property here involved, and that they were made defendants because they would not join as plaintiffs. The Argalls filed their answer on February 27, 1899, admitting all the allegations of the complaint. Judgment was given for McWhirter, and against plaintiffs and the Argalls, May 4, 1899.

Upon the reversal of this judgment by this court, and the substitution as the successor of McWhirter and the Argalls, the plaintiffs, on February 4, 1902, filed a supplemental complaint, alleging that at the time of the commencement of the action, the Argalls and the plaintiffs were the owners of this property, and that since the filing thereof one of the then plaintiffs had transferred his interest to another plaintiff, and that the Argalls had forfeited to the plaintiffs their co-owners, all their interest, for failure to contribute their proportion of the cost of the assessment work for the year 1898, after proper notice given them on December 20, 1899, the allegations in this behalf being apparently sufficient to bring the case within the provisions of Sec. 2324 U. S. Rev. Stat., relative to forfeiture to co-owners. It was also alleged that the alleged subsequent grants to the immediate predecessor of appellant and appellant itself were taken by the grantees with full notice of such forfeiture.

It was further alleged that the plaintiffs were the owners
278 and entitled to the possession of all the property, that the appellant claimed some interest therein adverse to plaintiffs, which claim was without any right whatever, and this was followed by the ordinary prayer in complaints to quiet title.

The appellant answered, denying the allegations of the supplemental complaint, setting up its claim based on the McWhirter location, and alleging the transfer by the Argalls to have been made on May 31, 1899, prior to the giving of the notice to contribute. The case was tried upon the issues thus made. The Court found in accord with the allegations of the supplemental complaint as to the doing of the required work for the year 1898, the failure of the

Argalls to do any of the same, and their failure to contribute their proportion after notice personally served on them, but it further found that such notice was not given until "after they had executed and delivered" their conveyance to the Yosemite Company, and had ceased to be co-owners with plaintiffs, and upon this ground, concluded that there had been no forfeiture. It made no finding at all upon the allegation that the Yosemite Company and appellant had notice of the facts upon which the claim of forfeiture is based.

It however, further found facts, not specifically alleged in the complaint or answer, upon which it based the conclusion that as between plaintiffs and appellant, the plaintiffs are the successors in interest of the Argalls in their n-ne-twentieths of said claim. These findings were based upon the judgment roll in an action brought by said plaintiffs in March, 1901, against certain parties, including this appellant, to obtain a judgment permitting them to redeem the property from a sale of an undivided nineteen-twentieths of the land, made under a decree of foreclosure of mortgage. It was alleged in the complaint therein that these plaintiffs are the owners of an undivided nineteen-twentieths of said property, and "are the successors in interest of the judgment debtors in said action," among whom were the Argalls, who were, with others, personally liable for
279 the debt, and whose interest in the land was subject to the mortgage. The appellant was the assignee of the certificate of purchase issued by the commissioner at such sale, and it and the commissioner refused to receive from plaintiff- the money necessary to effect a redemption.

The defendants in that action filed their answer, denying speci'-ically that plaintiffs were the successors in interest of the judgment debtors. They then offered to allow judgment permitting plaintiffs to redeem the property upon payment of $2440, less their costs, and plaintiffs accepted the offer, and judgment was entered accordingly, plaintiffs waiving their further claim for damages. The court did not make findings of fact, findings having been waived, and the judgment entered recited the offer and acceptance, and, the money having been paid, decreed a redemption, and further expressly adjudged "that the plaintiffs herein redeemed the premises and property hereinafter described from said foreclosure sale, as the successors in interest of the judgment debtors in the action aforesaid." This judgment had become final prior to the trial of this cause.

Plaintiffs claim, and the trial court held, that the effect of these proceedings was to estop appellant from here disputing that plaintiffs succeeded to the Argall interest.

The judgment roll in that proceeding was offered by plaintiff- in rebuttal, appellant's testimony having been to the effect that the notice to contribute was not given to the Argalls, until after they had ceased to be co-owners in the property. It was objected to upon the grounds, among others, that it was not put in issue by the pleadings, and was irrelevant, incompetent and immaterial. It was received in evidence, subject to a motion to strike out, and such motion was made at the conclusion of the trial, upon substantially similar grounds, and denied. The exceptions to these rulings sufficiently

present the points made by appellant in regard to the effect of the proceedings in the redemption suit, *do* far as this appeal is concerned. We are satisfied that this judgment roll should not
280 have been received in evidence.

It is urged that it was proper evidence in rebuttal of appellant's evidence tending to show that there was no forfeiture. There is, however, nothing in the judgment roll to indicate that the precise question of the alleged Argall forfeiture was involved in the redemption suit. Taking the allegation of succession in the complaint therein as material in its full scope, it was simply that *that* the plaintiffs therein "are the successors in interest of the judgment debtors in said action." By what means, they succeeded to those interests was not alleged. The allegation was broad enough to include any of the numerous methods by which realty may be acquired. That plaintiffs were the sucessors in interest of the Argalls *by forfeiture* or, indeed, that they were their successors in interest at all, is not essential to the validity of the judgment therein, for admittedly they had succeeded to the other interests, and, as successors in any mode of one or more of the co-tenants, were entitled to redeem the whole property. (Code Civ. Proc. Sec. 701, sub. 1.) As successors in part, they c-uld not redeem at all, except by redeeming the whole. (Eldridge *v.* Wright, 55 Cal. 531-534.) Where it is sought to show that a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated. (Beronio *vs.* Ventura Co. L. Co. 129 Cal., 232-236.) The judgment roll here not showing affirmatively that the question of *forfeiture* of the Argall interest was involved in that action, it was not admissible in rebuttal of appellant's evidence showing that there was, in fact, no forfeiture.

We are also of the opinion that the judgment in the redemption suit cannot be held to raise an estoppel upon the question as to the succession to the Argall interest. In Beronio *vs.* Ventura County Lumber Co. *supra,* it was said: "In order that a judgment in
281 one action may consti-ute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. (Citing authorities.) 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' (Coke on Littleton, 352, *b.*) 'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' * * * By section 1908, sub. 2, of the Code of Civil Procedure, the effect of a judgment is conclusive in respect to the matters directly adjudged," and by section 1911, 'that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto." (See also Freeman on Judgments, Sec. 256.) This is

simply a statement of elementary principles relative to estoppel by judgment.

The thing adjudged in the redemption action was simply that the plaintiffs, as successors in interest, had the right to redeem the whole of this property from the foreclosure sale. That they should have this right, it was essential that they should be successors in interest of one or more of the judgment debtors in *some portion* of the property, but it was not essential to this right, and therefore not essential to the judgment, that they should be the successors in interest of all the judgment debtors. (C. C. P. Sec. 701, sub. 1.) Their allegation that they were the successors of all the judgment debtors was material in the sense that it was necessary for them to prove that they had succeeded to the interest of some judgment debtor in some part of the property, and the judgment is necessarily conclusive upon that point. Does it appear that anything further was determined by the judgment? We certainly cannot say that the offer to allow judgment permitting plaintiffs to redeem admitted anything
282 more than was essential to such right of redemption. The judgment upon its face shows that there was no trial of any of the issues, and that the judgment was purely a consent judgment, based entirely on the offer and acceptance. It cannot be said, with any degree of certainly whatever, from the face of this record that the question of the succession as to the Argall interest was litigated and determined in that proceeding. Indeed, the contrary affirmatively appears, and we are satisfied that the judgment is conclusive only of that which is essential to support it, viz.: that plaintiffs had succeeded to *such* an interest in the property as entitled them to redeem.

We think the somewhat peculiar adjudication of the decree as to the character in which the plaintiffs redeemed the premises, adds nothing to the effect of the record.

Some point is made as to the acceptance on redemption of all the redemption money, including that portion due on the Argall interest, but we do not see how this can affect the question here discussed.

It is contended by appellant that, as the plaintiffs have chosen to set forth in their supplemental complaint the particular facts upon which their alleged title to the Argall interest rests, the allegation of ownership, in connection therewith, was a mere conclusion that they could, therefore, recover only by showing title *by forfeiture* from the Argalls, and that the judgment roll in the redemption suit was inadmissible under the issues made to show title in them. See Castro *v.* Richardson, 18 Cal. 478; Licks *v.* Diaz, 30 Cal. 65, 75; Haven *v.* Seeley, 59 Cal. 494; Turner *vs.* Whote 73 Cal. 299; Levins *v.* Revegno, 71 Cal. 275; Hesser *vs.* Miller, 77 Cal. 192; Gruwell *vs.* Seibolt, 82 Cal. 9; Sav. & Loan Soc. *v.* Burnett, 106 Cal. 514, 538.)

There is much force in this contention, but as we here uphold objections made by appellant to this judgment rol-, which go to the merits, it will be unnecessary to discuss an objection of this nature, which could be obviated by amendment of the plead-
283 ings.

No point is made on this appeal as to the findings of fact

relating to the question of forfeiture. It may be material to that question to determine whether at the time of the service of the notice to contribute, the plaintiffs had been notified, actually or constructively, of the transfer by the Argalls. As this question has not been discussed, we do, not decide the same. It appears unnecessary to require the parties to again litigate the question of title as to the remaining eleven-twentieths of the property. As to that portion the judgment was clearly correct.

To the extent that the judgment decrees that plaintiff F. F. Britton is the owner of an undivided one-fourth of the property, that plaintiff Annie L. Emerson is the owner of an undivided one-fourth thereof, and that plaintiff Jacob Miller is the owner of an undivided one-twentieth thereof, the judgment and order denying a new trial are affirmed. As to the remaining undivided nine-twentieths, constituting what is known as the Argall interest, the judgment and order are reversed, and the cause remanded for a new trial, with the right to the parties to amend their pleadings as they may be advised.

ANGELOTTI, *J.*

We concur:
SHAW, *J.*
HENSHAW, *J.*
McFARLAND, *J.*
LORIGAN, *J.*

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed March 27, 1906, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court this 20th day of June, A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk.*
By GEO. H. S. DRYDEN, *Deputy.*

284 In the Supreme Court of the State of California.

Sac. 1142.

EMERSON BRITTON, ET AL.
v.
YOSEMITE GOLD MIN. & — CO.

By the COURT: The order made April 23rd 1906, provisionally granting application for rehearing in certain cases, is hereby vacated as to the above entitled cause, and the application for a rehearing therein denied.

BEATTY, *C. J.*
ANGELLOTTI, *J.*
SLOSS, *J.*
McFARLAND, *J.*
SHAW, *J.*

Dated this 21st day of May, 1906.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed May 21, 1906, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court this 16th day of May, A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By GEO. H. S. DRYDEN, *Deputy*.

285 In the Supreme Court of the State of California.

Sac. No. 1142.

Bank.

E. L. EMERSON ET AL., Pl't'ffs & Resp's,
vs.
YOSEMITE GOLD MINING & MILLING CO., Def't & App.; HARRY ARGALL ET AL., Def'ts.

On Appeal from the Superior Court in and for the County of Tuolumne.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Angellotti, J.

We concur: Shaw, J.; Henshaw, J.; McFarland, J.; Lorigan, J.

Whereupon, it is ordered, adjudged, and decreed by the Court that to the extent that the judgment of the Superior Court in and for the County of Tuolumne in the above entitled cause, decrees that plaintiff F. F. Britton is the owner of an undivided one-fourth of the property, that plaintiff Annie L. Emerson is the owner of an undivided one-fourth thereof, and that plaintiff Jacob Miller is the owner of an undivided one-twentieth thereof, the judgment and order denying a new trial are affirmed, as to the remaining undivided nine-twentieth- constituting what is known as the Argall interest, the judgment and order are reversed and the cause remanded, for a new trial with the right to the parties to amend their pleadings as they may be advised, appellant to recover costs of Appeal,

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 27th day of March, 1906, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 13th day of July, A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

[Endorsed:] Sac. 1142. In the Supreme Court, State of California. Remittitur. E. L. Emerson *et al.*, Pl't'ffs & Resp's, *vs.* Yosemite Gold M. & M. Co. *et al.*, Def'ts & App's. Clerk's Costs, $—; Paid by Appellant, $12.50; Paid by Respondent, $—; Total, $12.50. Frank C. Jordan, Clerk. —— ——, Deputy.

286 In the Supreme Court of the State of California.

YOSEMITE GOLD MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, and HARRY ARGALL, Defendants in Error.

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The petition of the Yosemite Gold Mining and Milling Company, a corporation, respectfully shows:

That on the 27th day of March, A. D. 1906, the Supreme Court of the State of California rendered a final judgment against your petitioner in a certain cause wherein E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton and Jacob Miller were plaintiffs, and
287 your petitioner, together with Harry Argall and F. L. Argall were defendants, adjudging and decreeing that said F. F. Britton and Annie L. Emerson are the owners of an undivided one-fourth (¼) each, and the said Jacob Miller is the owner of an undivided one twentieth (1/20) of the Slap Jack Mine, particularly described in said action, as will appear by reference to the record and proceedings in said cause; and that said court is the highest court of said state in which a decision in said suit can be had; and

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by Writ of Error, under Section 709 of the Revised Statutes of the United States, because:

I.

Walter J. Coyle, the alleged original locator of the Slap Jack Mine never made a valid location thereof, as required by Section 2324 of the Revised Statutes of the United States, and the local Mining Rules and Regulations of the Tuolumne Mining District, County of Tuolumne, State of California, in which said mine is located.

II.

In that the assessment work for the year 1898, requiring One Hundred Dollars ($100.00) worth of work to be done upon the vein or lode in the development thereof, as set forth in Section 2324 of the Revised Statutes of the United States, and as set forth in Section
288 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California, was not done.

III.

That there was no resumption of labor upon the Slap Jack Mine by the defendants in error, Britton, Emerson and Miller, in the year 1898, and before the re-location, January 1st, 1899, by R. S. McWhirter, grantor of plaintiff in error, as required by Section 2324 of the Revised Statutes of the United States.

IV.

That on the first of January, 1899, at the time of the location of the said mines by R. S. McWhirter, grantor of plaintiff in error, the said lands were open public mineral lands of the United States, and open to location as prescribed by Section 2324 of the Revised Statutes of the United States;

As appears by the record of the proceedings of said cause, which is herewith submitted, together with an Assignment of Errors attached hereto.

Wherefore, your petitioner prays allowance of a Writ of Error, returnable in the Supreme Court of the United States, and for a citation, and supersedeas.

And your petitioner will ever pray, etc.

YOSEMITE GOLD MINING AND MILLING CO.,
[SEAL.] By W. M. SMITH, *Sec., Petitioner.*

A. H. JARMAN,
Attorney for Petitioner.

289 STATE OF CALIFORNIA, *County of Santa Clara, ss:*

W. M. Smith, being first duly sworn, deposes and says:—that he is the Secretary of the Yosemite Gold Mining and Milling Company, a corporation, plaintiff in error herein; that he has read the above and foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief, and as to those matters, he belives it to be true.

W. M. SMITH.

Subscribed and sworn to before me this 15th day of June, A. D. 1906.

WM. M. BEGGS,
[SEAL.] *Notary Public in and for the County of Santa Clara, State of California.*

Let the Writ of Error issue as prayed.
Dated June 16, 1906.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

290 In the Supreme Court of the State of California.

YOSEMITE GOLD MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,

vs.

E. L. EMERSON, Mrs. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, and HARRY ARGALL, Defendants in Error.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of California, in the above entitled matter, there is manifest error in this, to wit:—

I.

The said court erred in deciding that Walter J. Coyle made a valid location of the Slap Jack Mine, contrary to the provisions of Section 2324 of the Revised Statutes of the United States,
291 by posting only one notice at the east end of the claim, whereas Section 3 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, State of California, require- "two notices, written or printed, upon paper or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be pos-ed in a conspicuous place at each end of the claim;" and which said Mining Rules and Regulations are recognized as a part of the laws of the United States governing Mining regulations.

II.

Said court erred in deciding and finding that the assessment work was done for the year 1898 on said Slap Jack mine by defendants in error, Britton, Emerson and Miller, whereas it is conceded by the record in said cause that Eighty-four and 80/100 Dollars worth of work only was done upon said mine and mining claim, which said finding is contrary to Section 2324 of the Revised Statutes of the United States, which requires One Hundred Dollars worth of work to be done, and which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California, which provides as follows:—

"On each claim located after the passage of this Act, * * * not less than one hundred dollars worth of work shall be performed or improvements made during the year * * *, which said amount of work shall be done exclusively upon the vein or lode in the development thereof."

III.

292 Said court erred in finding and deciding that said defendants in error, Britton, Emerson and Miller, resumed work upon said Slap Jack Mine and Mining Claim on the 31st day of December, 1898, whereas, the conceded fact, as appears from the

record in said cause, is that only Eighty-four and 80/100 Dollars worth of work, altogether, was done upon said mine and mining claim by said parties, during the year 1898, and because said finding and decision is in contravention of Section 2324 of the Revised Statutes of the United States:—

"On each claim located * * * not less than one hundred dollars worth of labor shall be performed or improvements made during each year; upon a failure to comply with these conditions, the claim or mine upon which such failure occurred, shall be opened to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure, and before such location;"

and which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California, and that part thereof, to wit:—

"On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this Act, ten dollars worth of labor shall be performed, or improvements made each year, for each one hundred feet in length
293 along the vein, until a patent shall have been issued therefor, but where such claims are held in common, such expenditure may be made upon any one claim and upon such failure to comply with these conditions, the claim or mine upon which failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, which said amount of work shall be done exclusively on the vein or lode in the development thereof."

IV.

Said court erred in finding and deciding that at the time of the location of said grounds, to wit,—January 1st, 1899 by R. S. McWhirter, the grantor of plaintiff in error, said lands were not open public mineral lands of the United States, and that they were not open to location, and that the said lands were the property of the defendants in error, Emerson, Britton and Miller, which said ruling and decision is contrary to the facts found that the said defendants in error had not performed the requisite work upon the mine for the preceding year, and is also contrary to the provisions of Section 2324 of the Revised Statutes of the United States, and also of Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, State of California, as hereinbefore set forth in Assignment of Error, Number Three.

V.

Said court disregarded, as shown in Assignments I, II, III and IV hereinbefore set forth, the provisions of Section 2324 of the
294 Revised Statutes of the United States, as asserted by counsel

for plaintiff in error in argument and in their brief in said cause before said Supreme Court of the State of California.

A. H. JARMAN,
Attorney for Plaintiff in Error.

295 [Endorsed:] Copy Supreme Court of the State of California. Yosemite Gold Mining & Milling Company, a corporation, Plaintiff in Error, *vs.* E. L. Emerson, *et al.*, Defendants in Error Petition and assignments of error. Filed Jun- 16 1906 Frank C. Jordan, Clerk By —— —— Deputy A. H. Jarman, Attorney at Law, Suite 44, Auzerais Bldg., San Jose, Cal.

296 In the Supreme Court of the State of California.

YOSEMITE GOLD MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, and HARRY ARGALL, Defendants in Error.

Know all men by these presents:—That we, the Yosemite Gold Mining and Milling Company, a corporation, as principal, and Peter Berg and Gilbert C. Farley, as sureties, are held and firmly bound unto the above named defendants in error, and to each of them in the penal sum of one thousand dollars, to be paid to the said obligees, their successors, representatives and assigns for the payment of which, well and truly to be made, we bind ourselves, our heirs, Executors and Administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of June, A. D. 1906.

Whereas, the above named plaintiff in error hath prosecuted a Writ of Error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of California, on March 27th, 1906, wherein E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton and Jacob Mil-

297 ler were plaintiffs and respondents, and the above bounden principal was defendant and appellant.

Now therefore, the conditions of this obligation is such, that if the above named plaintiff in error shall prosecute his said Writ of Error to effect and answer all costs and damages, if he shall make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] YOSEMITE GOLD MINING & MILLING COMPANY,
By W. M. SMITH, *Secretary.*
P. BERG.
G. C. FARLEY.

STATE OF CALIFORNIA, *County of Santa Clara, ss:*

Peter Berg and Gilbert C. Farley, being first duly sworn, each for himself, and not for the other, doth depose and say:—that he is a

resident of the State of California, and of the County of Santa Clara, and a householder therein; that he is worth the sum specified in the foregoing undertaking over and above his just debts and liabilities in property not exempt from execution.

P. BERG.
G. C. FARLEY.

Subscribed and sworn to before me this 14th day of June, A. D. 1906.

WM. M. BEGGS, [SEAL.]
Notary Public in and for the County of Santa Clara, State of California.

298 The foregoing bond is approved this 16th day of April, A. D. '06.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

299 [Endorsed:] No. Sac. 1142 Dept. — Supreme Court, State of California. Yosemite Gold Mining & Milling Company, a corporation, Plaintiff in Error, *vs.* E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall and Harry Argall, Defendants in Error. Undertaking. Filed Jun- 16 1906 Frank C. Jordan, Clerk By —— —— Deputy A. H. Jarman, San Jose, Cal. Attorney for Plaintiff in Error.

300 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court before you, between Yosemite Gold Mining and Milling Company, a corporation, plaintiff in error, and E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall and Harry Argall, defendants in Error, before you or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit between Yosemite Gold Mining and Milling Company, a corporation, plaintiff in error and E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall and Harry Argall, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up

or claimed under such clause of the said Constitution, treaty,
301 statute, or commission a manifest error hath happened to the great damage of the said Yosemite Gold Mining & Milling Company, a corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, on the 21st day of August, 1906, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, S. H., clerk. Chief Justice [of the Supreme Court]* of the United States, this 23rd day of June, in the year of our Lord, one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court,
By —— ——, *Deputy Clerk.*

The above Writ of Error is hereby allowed. Dated June 23, 1906.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

302 [Endorsed:] In the United States Supreme Court. Yosemite Gold Mining & Milling Company, a corporation, Plaintiff in Error, *vs.* E. L. Emerson, F. L. Argall, Mrs. A. L. Emerson, Jacob Miller, and Harry Argall, F. F. Britton, Defendants in Error. Writ of Error. Filed Jun. 23 1906. Frank C. Jordan, Clerk. By —— Erb, Deputy. A. H. Jarman, attorney at law, suite 44, Auzerais Bldg., San Jose, Cal.

303 UNITED STATES OF AMERICA, *ss:*

To E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall, and Harry Argall, Defendants in Error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of California, wherein the Yosemite Gold Mining & Milling Company, a corporation, is plain-

[* Words enclosed in brackets erased in copy.]

tiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 23rd day of June, 1906.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

304 [Endorsed:] In the Supreme Court of the United States. Yosemite Gold Mining & Milling Company, a corporation, Plaintiff in Error, *vs.* E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall, and Harry Argall, Defendant- in Error. Citation. Filed Jun- 23, 1906. Frank C. Jordan, Clerk. By —— Erb, Deputy. A. H. Jarman, attorney at law, suite 44, Auzerais Bldg., San Jose, Cal.

305 In the Supreme Court of the United States.

YOSEMITE GOLD MINING & MILLING COMPANY, a Corporation, Plaintiff in Error,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, and HARRY ARGALL, Defendants in Error.

Received this 30th day of June, 1906, a copy of the Petition for Writ of Error, and Assignments and Specifications, Writ of Error and Citation in the above entitled action, being copies of the moving papers filed by the Yosemite Gold Mining & Milling Company, plaintiff in error, in its appeal to the United States Supreme Court from the final judgment, rendered by the Supreme Court of the State of California, on March 27th, 1906.

J. P. O'BRIEN,
CRITTENDEN HAMPTON,
Attorneys for E. L. Emerson, Mrs. A. L. Emerson, Jacob Miller, and F. F. Britton, Defendants in Error.

306 In the Supreme Court of the State of California.

YOSEMITE GOLD MINING & MILLING COMPANY, a Corporation, Plaintiff in Error,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL, and HARRY ARGALL, Defendants in Error.

Received this 30th day of June, A. D. 1906, a copy of the Petition for Writ of Error, Assignments and Specifications, Writ of Error and Citation in the above entitled action, being copies of the

moving papers filed by the Yosemite Gold Mining & Milling Company, plaintiff in error, in its appeal to the United States Supreme Court from the final judgment rendered by the Supreme Court of the State of California, on March 27th, 1906.

WILL M. BEGGS,
Attorney for F. L. Argall and Harry Argall.

307 In the Supreme Court of the State of California.

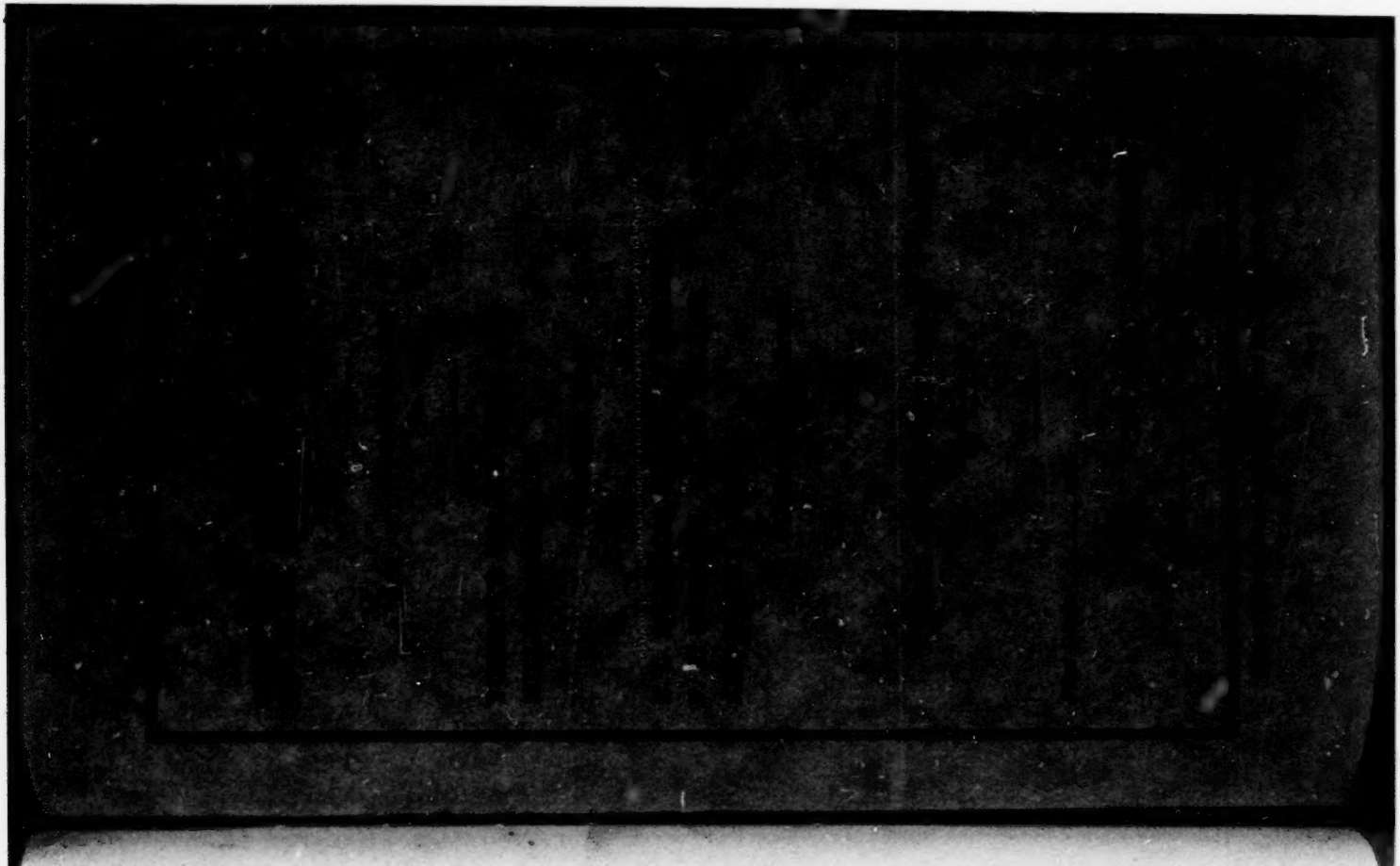
I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceeding and annexed is a true copy of the record in the case of Emerson *v.* Yosemite Gold — and Milling Company, and numbered therein from ⅛ to 300 inclusive.

Witness my hand and the seal of the court, this 23rd day of June A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk,*
By I. ERB, *Deputy Clerk.*

Endorsed on cover: File No. 20,312. California supreme court. Term No. 69. Yosemite Gold Mining and Milling Company, plaintiff in error, *vs.* E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall, and Harry Argall. Filed July 20th, 1906. File No. 20,312.



Supreme Court of the United States

YOSEMITE GOLD MINING AND MILLING COMPANY,
Plaintiff in Error,

vs.

E. L. EMERSON, MRS. A. L. EMERSON, F. F. BRITTON, JACOB MILLER, F. L. ARGALL AND HARRY ARGALL,

Defendants in Error.

Points and Authorities of Plaintiff in Error.

This is an Action to Quiet Title to a Mining Claim, Situated in Tuolumne County, Formerly Called the "Slap Jack Mine," but Located by R. S. McWhirter, the Predecessor of Plaintiff in Error, as the Jim Blaine Mine.

On February 10th, 1899, these defendants in error (other than Jacob Miller) filed their suit in the Superior Court of Tuolumne County to quiet their title to the "Slap Jack Mine" situated in said County. Issue was joined and on May 4th, 1899, judgment was rendered in favor of the defendant R. S. McWhirter, and against these plaintiffs and others, quieting the title to the property, in favor of the said McWhirter. An Appeal was taken by these plaintiffs to the Supreme Court of the State of California, in which Court judgment was given, reversing the judgment and ordering a new trial. (133 Cal. 510.) On February 3rd, 1902, a Supplemental Complaint was filed by these plaintiffs, setting up, in addition to the matters stated in their first complaint, a claim that the nine-twentieths interest which formerly belonged to Harry and Dr. Argall (formerly co-owners with these plaintiffs) has been forfeited to these plaintiffs because these plaintiffs had performed the assessment work for the year 1898, and after notice being given to the said Argalls, they, the Argalls, had neglected and refused to pay their proportion of

the amount expended for the said assessment work. Issue was joined by the plaintiff in error, Yosemite Gold Mining and Milling Company, and the cause came on for trial on February 17th, 1902, and findings were given in favor of defendants in error and against plaintiffs in error.

And thereafter plaintiffs in error applied to the Superior Court of the State of California in and for the County of Tuolumne, for a new trial, which, after argument was denied, and thereupon plaintiffs in error appealed to the Supreme Court of the State of California from the judgment and order denying new trial, and after argument in the Supreme Court of the State of California, the latter court rendered its decision and judgment in said action, a copy of which is set forth beginning on page 121 of the transcript of this record. Immediately upon the rendition of this judgment, application was made to the Supreme Court of the State of California to review and modify said opinion, which was denied, and said cause is now presented to this court on Writ of Error.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The said court erred in deciding that Walter J. Coyle made a valid location of the Slap Jack Mine, contrary to the provisions of Section 2324 of the Revised Statutes of the United States, by posting only one notice at the east end of the claim, whereas Section 3 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, State of California, require 'two notices, written or printed, upon paper or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim"; and which said Mining Rules and Regulations are recognized as a part of the laws of the United States governing Mining regulations.

II.

Said court erred in deciding and finding that the assessment work was done for the year 1898 on said Slap

Jack Mine by defendants in error, Britton, Emerson and Miller, whereas it is conceded by the record in said cause that Eighty-four and 80-100 Dollars' worth of work only was done upon said mine and mining claim, which said finding is contrary to Section 2324 of the Revised Statutes of the United States, which requires One Hundred Dollars' worth of work to be done, and which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California, which provides as follows :

> "On each claim located after the passage of this Act, * * * * not less than one hundred dollars' worth of work shall be performed or improvements made during the year * * *, which said amount of work shall be done exclusively upon the vein or lode in the development thereof."

III.

Said court erred in finding and deciding that said defendants in error, Britton, Emerson and Miller, resumed work upon said Slap Jack Mine and Mining Claim on the 31st day of December, 1898, whereas, the conceded fact, as appears from the record in said cause, is that only Eighty-four and 80-100 Dollars' worth of work, altogether, was done upon said mine and mining claim by said parties, during the year 1898, and because said finding and decision is in controvention of Section 2324 of the Revised Statutes of the United States:

> "On each claim located * * * not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; upon a failure to comply with these conditions, the claim or mine upon which such failure occurred, shall be opened to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure, and before such location;"

and which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District,

Tuolumne County, California, and that part thereof, to-wit:

> "On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this Act, ten dollars' worth of labor shall be performed, or improvements made each year, for each one hundred feet in length along the vein, until a patent shall have been issued therefor, but where such claims are held in common, such expenditure may be made upon any one claim and upon such failure to comply with these conditions, the claim or mine upon which failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, which said amount of work shall be done exclusively on the vein or lode in the development thereof."

IV.

Said court erred in finding and deciding that at the time of the location of said grounds, to-wit,—January 1st, 1899, by R. S. McWhirter, the grantor of plaintiff in error, said lands were not open public mineral lands of the United States, and that they were not open to location, and that the said lands were the property of the defendants in error, Emerson, Britton and Miller, which said ruling and decision is contrary to the facts found that the said defendants in error had not performed the requisite work upon the mine for the preceding year, and is also contrary to the provisions of Section 2324 of the Revised Statutes of the United States, and also of Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, State of California, as hereinbefore set forth in Assignment of Error, Number Three.

V.

Said court disregarded, as shown in Assignments I, II, III and IV hereinbefore set forth, the provisions of

Section 2324 of the Revised Statutes of the United States, as asserted by counsel for plaintiff in error in argument and in their brief in said cause before said Supreme Court of the State of California.

I.

Walter J. Coyle Never Made a Valid Location of the Slap Jack Mine.

The evidence is insufficient to justify the decision of the court contained in Finding 4 of the Findings of Fact.

There was but one notice posted on the claim upon its attempted location by Walter J. Coyle. "I put up one notice at the East end of the claim." (Trans. page 29.)

Section 2324 of the Revised Statutes of the United States says: "The miners of each mining district may "make regulations not in conflict with the laws of the "United States or with the laws of the State or Territory "in which the district is situated, governing the location, "manner of recording, amount of work necessary to hold "possession of a mining claim, subject to the following "requirements: The location must be distinctly marked "on the ground so that its boundaries may be readily "traced," etc., etc.

It will be observed that miners may make rules and regulations for three separate and distinct purposes: (a) for Governing the Location, (b) manner of recording, (c) and for the amount of work necessary to hold possession of a mining claim. This the miners of Tuolumne County have done. The rule for Governing the Location is set forth in Section 3 of the Quartz Mining Rules of Tuolumne County. (Trans. page 77.) The Manner of Recording is provided for by Sections 4 to 7 inclusive. (Trans. page 78.) Section 8 provides for the amount of work to be done on the claim in order to hold it. A forfeiture is made should the miner fail to record his notice of location within thirty days after the location, and the forfeiture for failure to do the assessment work is the same as in the mining laws of the United States.

To make a location of a mining claim under these rules and regulations the United States laws must be followed in reference to marking the boundaries on the ground so that the same may be readily traced, and, in addition thereto, a notice of location must be posted at each end of the claim. When this is done a claim is located, and not before. These initiatory steps must be taken before any right vests in the locator. There must be a vested right of some kind before there can be a forfeiture of that right. A man cannot forfeit that which he has not, or never has had.

As was said in Adams vs. Crawford, 116 Cal. 498: "The discovery is but one step in acquiring title to a min-"ing claim. It must be followed by a location, which "consists of the marking of the claim by monuments so "that its boundaries can be readily traced, the posting of "a notice thereon, and where the State or district law re-"quires it, the recording of such notice."

We hold, however, that the recording of the notice is not an act of location, but something that follows the acts of location. The acts of location are what are done upon the ground. The local rules of Tuolumne County prescribed what shall be done upon the ground in order to make the location, and these rules must be followed.

The rules so adopted by the miners of the district, except where in conflict with some laws of the United States or of the State of California, being authorized and sanctioned by express statutory enactment, are, when in force, as valid and binding as if they were a part of the statute itself.

Gird vs. California Oil Co., 60 Fed. Rep. 531-534.

In Gird vs. California Oil Co., the rules and regulations of a mining district were under consideration, Section 1 of which provided:

"Any one locating a claim or association of claims "must show the notice duly posted on the claim, also the "corners of the claim, to a witness, who must be a claim

"owner in the district, who will sign said notice, also a "copy of the same to be given to the Recorder for record- "ing."

One of the notices of location involved in that case was not witnessed as required by the rule of the district, and the Court held that the location was invalid, notwithstanding there was no forfeiture clause in the rule. (Page 538.) Another of the locations in that case was held to be invalid because the notice of location was neither recorded nor witnessed as required by the local rules.

In the case of Howeth vs. Sullinger, 113 Cal. 550, the Court held:

"Section 2324 of the United States Revised Statutes "provides that 'the location must be distinctly marked "on the ground so that its boundaries can be readily "traced,' but does not prescribe how it shall be marked; "that matter is left to the regulation of local rules."

Carter vs. Baccigalupi, 83 Cal. 188.

"Section 2320 Rev. St. concedes to mining districts "the power to diminish the surface width of mining claims "from 300 ft. on each side of the middle of the vein to 25 "feet on each side thereof. In Mining Co. vs. Kerr, 130 "U. S. 256, the Supreme Court, through Mr. Justice Field, "declared that the effect of such a mining regulation " 'could not be doubted'."

Northmore vs. Simmons, 97 Feb. Rep. 388.

In Harvey vs. Ryan, 42 Cal. 626, the Court held: that in an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district some five years before, which did not require the posting of notices upon the claim at the time of location, and defendant offered to prove that there was a custom in the district requiring the posting of such notices, and the Court excluded the evidence upon the ground that the written rules superceded any customs, that the exclusion of such evidence was error.

Section 748 of the Code of Civil Procedure provides:

"In actions respecting mining claims proof must be "admitted of the customs, usages, or regulations estab- "lished and in force at the bar or diggings embracing "such claim, and such customs, usages, or regulations, "when not in conflict with the laws of this State, ***must "govern the decision of the action.***"

The cases hold that miners have the authority of the United States Statutes and the law of the State of California, authorizing and empowering them to make regulations governing the location of a mining claim, and that such regulations must be followed, otherwise the attempted location not following such regulations is invalid ab initio.

II.

Said court erred in deciding and finding that the assessment work was done for the year 1898 on said Slap Jack Mine by defendants in error, Britton, Emerson and Miller, whereas it is conceded by the record in said cause that eighty-four and 80-100 dollars' worth of work only was done upon said mine and mining claim, which said finding is contrary to Section 2324 of the Revised Statutes of the United States, which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California.

Section 8, Mining Rules and Regulations of Tuolumne County provides, among other things, as follows:

"On each claim located after the passage of this act, "etc. * * * * * * not less than $100.00 worth of la- "bor shall be performed or improvements made during "each year * * * * * * * * ***which said amount "of work shall be done exclusively upon the vein or lode "in the development thereof.*** (Page 79.)

The court found that the sum of $84.90 was expended for labor upon the mine during the year 1898; of this sum there was but $3.00 worth of work done for the purpose

of developing the mine or lode in accordance with said Rule 8 above referred to.

The evidence shows the balance of said amount was done exclusively for the purpose of clearing out the shaft so that an expert could examine the mine for the purpose of sale.

According to the testimony of E. L. Emerson, one of the plaintiffs, as brought out on cross-examination, it appears that he lives at Mountain View and is a farmer and fruit grower, and that he never followed mining as a business. That he went up to the Slap Jack Mine sometime between the 11th and 15th of March, 1898, for the purpose of taking the water out of the shaft, as an expert was coming to examine the mine. He wanted to clean the shaft up so the expert could see it. He hired Walter Coyle and the other laborers and in three days and three nights had taken the water out of the shaft. He then says:

"I got the water out and had to keep it out till the ex-
"pert could come, but he did not come at all. We kept the
"water partly down so that the expert could see it in three
"hours if he came. I hired the expert to come, but I never
"saw him. Anyway I left before I saw him, and do not
"know that he ever came. ***I took the water out solely***
"***that the expert could see the mine*** and if he reported it
"favorably the mine would be sold." (Trans. page 87.)

In the first place Plaintiff in Error contends that the work done and expenditure made in pumping out that shaft, and then lowering the bucket and hoisting it, at just such intervals as would keep the water down, is not such labor upon the mine as tended to develop it, and hence should not be counted as any part of the assessment work done.

It is clearly the intent of the mining laws of the United States that the annual labor performed upon a mining claim shall be of some substantial benefit to the claim.

Du Prat vs. James, 65 Cal. 555.
McCormick vs. Baldwin, 104 Cal. 227.
Book vs. Justice Co., 58 Fed. 106-117.

Pumping the water out of this shaft merely for the purpose of an expert inspecting it was of no greater benefit to the claim than if rock had been picked from the walls of the shaft, or from the out-croppings of the ledge, and after sampling it, or breaking it and examining it under a glass, or crushing it in a mortar and panning it out, would have been. Such labor, if it be so called, has been held not to add to the value of the claim nor tend to the development of the mine and is not assessment work, as required by law.

Bishop vs. Baisley, (Ore) 41 Pac. 936.

Pumping out the water from the shaft for the purpose of having the expert examine it was of no greater benefit to the mine, than if the shafts and drifts had been filled with foul air and fresh air had been pumped into them in order that the expert might enter.

The court, however, held that the labor in pumping out the shaft for the purposes shown by the testimony would count as assessment work, but it did not allow as a part of the assessment work the $30.00 paid to Emerson by one of his co-partners for his superintending the work. In this we believe the Court was correct. Emerson admits in his cross-examination that he did not work; that he merely looked on and suggested what should or should not be done. If the owner's time could be so counted as assessment work how easy would it be for a man who was not a miner, or accustomed to that character of labor, to employ one man and put him to work upon his claim and then by overseeing and superintending this one man's labor for the period of seventeen days, counting labor at $3.00 per day, thereby expend $100.00 worth of labor upon the claim. That is, he would pay the hired man $51.00 and count his own time for the other $51.00. It needs no citation of authorities to refute so idle and so preposterous a proposition.

Defendants in Error contend that in October, 1898, F. F. Britton and E. L. Emerson worked three days each in sinking on the ledge upon the mine.

The character of the labor is fully set forth in the testimony of Emerson. (Trans. page 85.) They spent at

least one day measuring the lines of the claim and looking up the corners, and then cleaned out an old hole near the barn.

The Court did not consider the labor of looking over the claim running out lines as development work and that what work they did in that hole near the barn amounted to nothing.

It appears from the evidence of E. M. Elwell (Trans. page 67) that a practical miner could do all the work Emerson and Britton did in this hole in about fifteen minutes. Defendants in Error were trying to sell a hole in the ground and to that end and extent their labors were limited.

For the foregoing reasons Plaintiff in Error contends that the findings are not supported by the evidence that $84.90 worth of labor or improvements was performed or made upon the Slap Jack Mine during the year 1898.

III.

Said court erred in finding and deciding that said defendants in error, Britton, Emerson and Miller, resumed work upon said Slap Jack Mine and Mining Claim on the 31st day of December, 1898, whereas, the conceded fact, as appears from the record in said cause, is that only eighty-four and 80-100 dollars' worth of work, altogether, was done upon said mine and mining claim by said parties during the year 1898, and because said finding and decision is in contravention of Section 2324 of the Revised Statutes of the United States, and which is also contrary to Section 8 of the Mining Rules and Regulations of the Tuolumne Mining District, Tuolumne County, California.

The evidence in the case shows beyond a question of doubt that the witness Boynton performed no work on the mine on the 31st day of December, nor did he do any work until the 2nd day of January, 1899.

The only witness who testifies affirmatively that he did perform any work is the witness J. E. Boynton, himself. He says he cut willows along the N. E. Corner line. (Trans. page 89.) The witness Cornwell simply testifies

that he took the witness Boynton to the mine on the last day of the year, but did not see him do any work there.

Against the testimony of these two witnesses, Plaintiff in Error has the uncontradicted testimony of the witnesses McWhirter, Rose M. Coyle, Eugene M. Elwell, Mary A. Elwell and Jas. Paul. Their testimony is as follows:

R. S. McWhirter—On the 31st day of December, went around the corners and did not see any one working. I would have seen them had they been there. (Trans. page 51.)

Again—The willows growing on the Slap Jack claim are on the eastern part. There are no willows growing on the westerly end of the claim. The dense brush is on the westerly end. The willows on the east end are scattered. I could readily walk around among them. * * * * * * * On December 31, 1898, I went over both ends about the same, I went over the claim again on Sunday. I did not notice any willows being cut on Sunday, Jan. 1st. If there had been any willows cut upon the Slap Jack Mine prior to Jan. 1st, and particularly the easterly end, I would have seen them. (Trans. page 57.)

Q. Mr. McWhirter, did you make any examination about the willows being cut when you were there on Jan. 1st?

A. Well, I was pretty well over the property; if there had been any willows cut lately I would have seen them. (Trans. page 57.)

Mrs. Walter J. Coyle testifies that on Dec. 31, 1898, Boynton came to the Slap Jack Mine between two and three o'clock in the afternoon; that he busied himself the balance of the day in arranging his effects, packing fire wood, water and pine branches until it became dark. (Trans. page 61.)

Eugene L. Elwell testifies: I first saw Mr. Boynton about 7 o'clock in the afternoon of the 31st of December. (Trans. page 68.) I was over the easterly end of the mine on the 1st of Jan. 1899, with McWhirter and did not observe that any brush had been cut in that vicinity. No

sign of any brush having been cut at all. After Jan. 1st Mr. Boynton cut brush in that locality right alongside the road. * * * * * * * * I knew where the corners of the Slap Jack Mine were on Jan. 1st. I was on the easterly end of the claim between 10 and 11 o'clock sometime in the forenoon. If there had been any willows cut I would have seen them. (Trans. page 70.) He was not there on the night of the 30th. (Trans. page 71.) With reference to the re-location of the Slap Jack Mine, Mr. Boynton came there the night before. That is the same night he came, on the 31st, and it was jumped that night. (Trans. page 71.)

Mary A. Elwell testifies as follows: Between two and three o'clock on Dec. 31, 1898, Mr. Boynton came to the Slap Jack Mine. (Trans. page 59.) This was the first time that Boynton came to that house. He was not there the day before. (Trans. page 59.) Mr. Boynton was occupied in getting wood, water and pine needles from the time he came there on Dec. 31st, till dark. We sat right by the window. He was passing back and forwards and I could not help but see him. (Trans. page 61.)

Jas. Paul testifies as follows: I did not see anybody at work on the Slap Jack Mine during the 31st of Dec. If there had been any one there we would have seen them. (Trans page 76.)

Even according to the testimony of the plaintiffs' witness, the work done by him on the 31st day of December, 1898, was clearing brush on the easterly boundary of the claim and was not work done on the ledge and for the development thereof, as required by the local rules and regulations which provide: "*Which said amount of work shall "be done exclusively upon the vein or lode in the develop-"ment thereof.*" (Trans. page 79.)

There is no evidence whatever, nor is it claimed that any work was done upon the claim on the first day of January by Defendants in Error, or any one of them.

The resumption of labor must take place after the expiration of the last day of the year and before the re-location thereof shall have been made.

Sec. 2324 of the Rev. Stat. of U. S.
Russell vs. Bosseau, 65 Cal. 605.
McCormick vs. Baldwin, 104 Cal. 227.
Belk vs. Meagher, et al, 104 U. S. 279.

This Court has declared in Du Prat vs. James, 64 Cal. 556-557 the law of this case.

"It has been held by the Supreme Court of the United "States, and by this Court, that a person cannot enter "upon the actual possession of another for the purpose of "laying foundation for a pre-emption claim to public "lands of the United States; and it is claimed by appellant "that the same principle operated upon the parties to this "controversy, and the defendants could not lawfully en- "ter upon the possession of the plaintiff and make a valid "location, nor acquire any right as against the plaintiff; "that the defendants could not, by a trespass, lay a foun- "dation for obtaining the benefits of the Act of Congress "for the location of mining claims. The cases of Eilers "vs. Boatman, 3 Utah 159, and Weese vs. Barker, 7 Colo. "179, are cited to support this view; but we think a close "examination of the Act of Congress (Rev. Stats. U. S., "Secs. 2322 and 2324) show the reverse to be the better "view. After declaring in Section 2322 that the locators "of all mining locations so long as they ***comply*** with the "laws of the United States, and with the State, ***territorial "and local regulations***, not in conflict therewith, shall "have the exclusive right of possession and enjoyment of "all surface included within the lines of their location, and "of all veins, etc.," and after declaring in Section 2324 that a certain amount of labor shall be performed in each year, it is provided in Section 2324 that "upon a failure to "comply with these conditions the claim or mine upon "which such failure occurred shall be open to re-location "in the same manner as if no location of the same had ever "been made. It seems from the foregoing that plaintiff's "only right to the possession depended upon the per- "formance, annually, of the specified labor; and the labor "being unperformed, the ground was open to re-location. "The Act of Congress does not say the ground shall be "open to re-location if the labor be unperformed and if it

"be unoccupied; on the contrary, as above stated, it is "open to re-location if the labor be unperformed. It is "urged that the clause of Section 2324, giving to the "original locator the right to perform the labor after the "failure and before the re-location, gave him the right (as "against the re-locator) to remain in possession and ex- "clude all others. The logical result of that proposition "would be to annul the requirement for the performance "of the labor—for if he may remain and prevent re-loca- "tion for one day, he may for a year—he may for an in- "definite period. Congress had the power to impose such "conditions on the right to the possession of the public "lands as it saw fit; and we think such conditions must be "complied with. It will be observed that the entry of the "defendant was peaceable and in good faith. The right "of the original locator to perform the labor after a fail- "ure, and have the benefit of his location, is dependent "upon his having performed the labor before the re-loca- "tion."

ARGUMENT.

I.

Coyle never made a valid location of the Slap Jack Mine. (Specification I, page 131 Trans.)

II.

The defendants in error never resumed work on the claim. (Specification III, page 131 Trans.) That the plaintiffs resumed work December 31st, 1898, is, first, insufficient under the evidence; and, second, is against law.

That portion of the Act of Congress which governs the decision of this case, reads:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the

same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." (U. S. Comp. St. 1901, Sec. 2324.)

The practical effect of the judgment and findings of the court is to amend the portion of this statute preceding the stars, which is quoted above, so that it shall read:

"On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, or the locator shall during the year commence to do this work or make these improvements, and shall during the year form an intention to complete the work or improvements after the expiration of the year, and shall subsequently effectuate that intention."

In order to sustain the findings and judgment of the court it would be necessary to amend the above section by adding thereto, "PROVIDED THAT AFTER FAILURE, LOCATION BE MADE ON SUNDAY, THE 1ST OF JANUARY, THE ORIGINAL LOCATORS HAVE NOT RESUMED WORK ON THE FOLLOWING MONDAY."

This change of the statute is certainly unwarranted. It annuls the condition precedent prescribed by the Act of Congress, for the validity of a mining claim, that not less than $100.00 worth of labor shall be performed during the year, and to substitute for it a requirement of an indefinite and an infinitesimal amount of labor in the teeth of the rule that statutes should be so construed as to effectuate rather than to destroy the enactments they contain (Potter's Dwarris on Statutes and Constitutions, p. 128, Sec. 16), because the language of the statute is plain, and its meaning is clear, so that it is not fairly open to a construction which so emasculates it (Lake Co. v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; U. S. v. Hartwell, 6 Wall, 396, 18 L. Ed. 830; Sturges v. Crowninshield, 4 Wheat, 122, 4 L. Ed. 529; Knox Co. v. Morton, 68 Fed. 787, 789, 15 C. C. A. 671; Railroad Co. v. Sage, 71 Fed. 40, 47, 17 C. C. A. 505); and because this interpretation really makes an exception to the provision

of the statute when its terms are plain, and contain no exception, so that the legal presumption is that Congress intended to make none (Shreve v. Cheesman, 69 Fed. 785, 786, 16 C. C. A. 413, 414; Madden v. Lancaster Co. 12 C. C. A. 566, 573, 65 Fed. 188, 195; Morgan v. City of Des Moines, 60 Fed. 208, 8 C. C. A. 569). The opposite construction, the interpretation that the statute means what it expresses, that it means as it reads, that if the $100 worth of work is not performed within the year the locator's right to the mining claim ceased, and that claim becomes subject to relocation at any time before he resumes his work, has been adopted by the Supreme Court in many cases, notably in Jackson v. Roby, 109 U. S. 442, where that court says of this section:

"The act of 1872—and its provisions are re-enacted in the Revised Statutes—declares that on each claim subsequently located, until a patent for it is issued, there shall be annually expended for labor or improvements $100, and on claims previously located an annual expenditure of $10 for each one hundred feet in length along the vein, and provides that when such claims are held in common, the expenditure may be upon any one of them. And it declares that upon a failure to comply with these conditions, the claim shall be opened for relocation in the same manner as if no location of the same had ever been made, provided the original locators, their assigns or representatives, have not resumed work upon it after failure and before relocation."

Considering now the facts of this case, in the light of the act of Congress and its interpretation by this Honorable Court, we find that in order to sustain the validity of the mining claim of the original locators they were required to perform work of the value of $100 on or before midnight of December 31, 1898; that they performed work of the value of only $3.00 outside of unwatering prior to that time; that they were not at work upon the claim when that day expired; that the statute declared that it then became "open to relocation in the same manner as if no location had ever been made;" that between that time and 1 A. M. of January 1, 1899, the defendants relocated the claim in strict conformity to the provisions of this statute; and that the original locators had not then resumed

and did not resume work upon it until January 2nd. These facts establish in the defendants a perfect right to this mining claim under the statute which has been quoted.

The original locators had no title or color of title to a superior, or any inchoate right to this claim when the defendants relocated it. They, therefore, had no right which drew to them the lawful possession as against the defendants, and they were not in the actual possession of it. The inchoate right of the original locators had ceased at midnight of December 31, 1898. Their possession, as against qualified locators, had also ceased, because the statute declared that the moment they had failed to do the work ***within the year***, the land was open to relocation, notwithstanding their possession, in the same manner as if no location of the same had ever been made. The only right remaining in the original locators was the right to resume work before the defendants relocated this land, and this was a mere floating right, subject to the earlier exercise of the right of the defendants. The defendants first exercised their right, and thereby secured a superior claim. In the second place, the entry of the defendants was peaceable.

Nor does the fact that the defendants relocated this claim between 12 o'clock and 1 o'clock at night militate in any way against its validity. Congress in its wisdom provided that the man who first after midnight of December 31st in each year relocated a forfeited claim should have the prior right to it when they enacted that the year within which the work should be done should commence on the 1st day of January succeeding the date of location. (U. S. Comp. St. 1901, Sec. 2324.) They might have provided that this year should commence at the hour when courts generally open, at ten o'clock in the forenoon, and the relocations would have been made between 10 and 11 in the morning. Under the act as Congress saw fit to enact it, the custom and practice of miners has been, is, and naturally will be, to make most of their relocations between 12 and 1 o'clock at night (Lindley on Mines, Sec. 652, p. 823), because only in this way can they be sure that the exercise of their rights will precede the exercise of similar rights by others. In this state of the law and the practice of miners, it is not perceived

that later relocations would be either more righteous or more secure than those immediately after the expiration of the year fixed by the act of Congress.

Under the provisions of the act of Congress under consideration the original locators of this claim had no inchoate right to it, and no possession of it when the grantor of plaintiff in error relocated it; that the peaceable entry of the plaintiff in error for that purpose was not a trespass; that its relocation established to it a perfect right to this mine superior to that of the original locators; and that these propositions are sustained by the act of Congress itself, and by the decisions of the courts, which have considered and decided the questions here presented. U. S. Comp. St. 1901, Secs. 2322, 2324; Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Du Prat v. James, 65 Cal. 555, 557, 4 Pac, 562; Russell v. Brosseau, 65 Cal. 605, 608, 609, 4 Pac. 643; Kramer v. Settle; 1 Idaho, 485, 491, 492; Renshaw v. Switzer (Mont.); 13 Pac. 127; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88. North Noonday v. Oneal; 1 Fed. Rep. 522, 536.

Section 2322, U. S. Comp. St. 1901, under which the original locators held this claim, provided that "the locators of all mining locations * * * so long as they comply with the laws of the United States * * * * shall have the exclusive right of possession and enjoyment" of their respective claims, and this provision was equivalent to a declaration that they shall not have the right to the possession and enjoyment of the claims when they cease to comply with the laws of the United States. When the plaintiff in error made its relocation, the original locators had ceased to comply with these laws, they had not performed the work which those laws required them to do during the year 1898 as a condition precedent to the continuance of their right, and they had no right either to the claim or to the possession of it. Section 2324 makes this conclusion clear for it provides that upon a failure to perform this work ***within the year*** the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," unless the original locators resume the work before relocation is made. When the plaintiff in error relocated the claim the orig-

inal locators had completely failed to do the required work of the year 1898, and they had not resumed work upon this claim. They were not in the actual occupation of it. The entry of the plaintiff in error upon it was peaceable, necessary to the exercise of the right given them by the statute, and it was made for the express purpose of enforcing that right. This entry, this relocation, could not have been a trespass, for a trespass is an unlawful interference with the right of another, and this relocation did not impinge upon any of the rights of the original locators or of any other parties. The only right they had was the right to resume work before the plaintiff in error relocated the claim. The right to resume and the right to relocate, vested in the respective parties the instant the 31st day of December passed. Congress granted the right to the land to the parties who first exercised their right. The plaintiff in error exercised its right to relocate before the original locators exercised their right to resume and they thereby acquired the better right to the property. Its acts of entry and relocation did not constitute a trespass, because it violated none of the rights of the original locators, but simply asserted and exercised a right Congress had expressly granted to it. These views are supported by repeated decisions of the courts.

Russell v. Brosseau, 65 Cal. 605.

McCormick v. Baldwin, 104 Cal. 227.

In Belk v. Meagher, 104 U. S. 279, 287, Belk had made a location of a mining claim, had performed work upon it, but had failed, like the original locators here, to fully comply with the statutes. No one had entered upon or interfered with his possession, and he was working upon the claim from time to time. He was at least as completely in possession as were the original locators in the case at bar. Thereupon, the defendants in that case as the Plaintiff in Error did in this case, peaceably entered upon and relocated the mining claim, and Belk insisted, as do the original locators in this case, that the property was covered by his location and was in his possession, so that the entry of the relocators was a trespass, and could not

be the basis of any lawful cl... under the rule of Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732. But the Supreme Court said:

"Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept it for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732, to the contrary of this. In that case it was held a right of pre-emption could not be established by a forcible intrusion upon the possession of one who had already settled upon, improved and inclosed the property. Upon that proposition the court was unanimous. We also agree that, if a peaceable entry had been made on lands which had not been enclosed or improved, a good right might have been secured. * * * * His (Belk's) possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants, having got into possession and perfected a relocation, have secured the better right."

In Du Prat v. James, 65 Cal. 555, 556, 557, 4 Pac. 562, hereinbefore cited, the plaintiff had located a mining claim, had performed the necessary work for the years

1876, 1877, 1878 and 1879, and had done work of the value of $9 in the year 1880. Thereupon, on January 1st, 1881, the defendants entered upon the possession of the plaintiffs, and relocated the claim, and the latter insisted that their relocation was a trespass and ineffectual. The Supreme Court of California said:

"It has been held by the Supreme Court of the United States, and by this court, that a person cannot enter upon the actual possession of another for the purpose of laying foundation for a pre-emption claim of public lands of the United States; and it is claimed by the appellant that the same principle operated upon the parties to this controversy, and the defendant could not lawfully enter upon the possession of the plaintiff and make a valid location, nor acquire any rights as against the plaintiff; that the defendants could not, by a trespass, lay a foundation for obtaining the benefit of the act of Congress for the location of mining claims. The cases of Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, and Weese v. Barker, 7 Colo. 178, 2 Pac. 919, are cited to support this view; but we think a close examination of the act of Congress (Rev. St. Secs. 2322; 2324) shows the reverse to be the better view. After declaring in Section 2322 that the locators of all mining locations, so long as they comply with the laws of the United States, and with the state, territorial and local regulations, not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, etc., and after declaring in Section 2324 that a certain amount of labor shall be performed in each year, it is provided in Section 2324 that upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. It seems from the foregoing that plaintiff's only right to the possession depended upon the performance, annually, of the specified labor, and, the labor being unperformed, the ground was open to relocation. The act of Congress does not say the ground shall be open to relocation if the labor be unperformed 'and' if it be unoccupied; on the contrary, as above said, it is open to relocation if the labor be unperformed. It is urged that the clause of Section

2324, giving to the original locator the right to perform the labor after the failure and before the relocation, gave him the right (as against the relocator) to remain in possession and exclude all others. The logical result of that proposition would be to annul the requirement for the performance of the labor; for, if he may remain and prevent relocation for one day, he may for a year—he may for an indefinite period. Congress had the power to impose such conditions on the right to the possession of the public lands as it saw fit, and we think such conditions must be complied with. It will be observed that the entry of the defendant was peaceable and in good faith. The right of the original locator to perform the labor after a failure, and have the benefit of his location, is dependent upon his having performed the labor before the relocation."

To the same effect are Russell v. Brosseau, 65 Cal. 608, 609, 4 Pac. 643; Kramer v. Settle, 1 Idaho, 491, 492; Renshaw v. Switzer (Mont.) 13 Pac. 127; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88. Any other rule, as the Supreme Court of California well says, practically repeals the statute, for if a locator, forming an intention, may hold the possession and the title to a mine against all comers for one hour, he may for two hours, two days, for an indefinite time. No case in which this question has been considered has come under our observation in which there is a decision which either conflicts with or modifies the rule established by these authorities. There is nothing of that character in the cases of Pharis v. Moldoon, (Cal.) 17 Pac. 70, and Belcher Consol. G. M. Co. v. Defarri, 62 Cal. 160. In each of these cases the original locators had resumed work upon the mining claim before the relocation was perfected. In the case at bar there was no resumption or attempted resumption in 1899 until after the relocation had been made. The act of Congress and the authorities under it seem to me to be clear and conclusive that where the work is not done within the year, the right of the locator ceases. Nothing but the required work will preserve it. Neither bad nor good intentions can be substitute for the work required, because the statute excludes them when it expressly limits the conditions precedent to the performance of the work within the year. When the

failure to do that work has occurred, nothing but a *resumption* of the work before a relocation will sustain the original location. Intention to resume, resumption after relocation, are each and all alike ineffectual to re-establish the original location, because the act of Congress expressly excludes them when it declares that resumption of the work before the relocation, and that alone, can re-establish the original location.

For these reasons, the judgment of the Supreme Court of California should be reversed, ~~and a new trial of this case ought to be granted.~~

IV.

The court erred in finding and deciding that at the time of the attempted location of said grounds by R. S. McWhirter the lands were not open public mineral lands of the United States and that they were not open to relocation or purchase, and that said lands were the property of plaintiffs.

It appears from the finding ten of Findings of Fact (Trans. page 20) that R. S. McWhirter, the predecessor in interest of the plaintiff in error, did and performed all of the acts necessary or requisite to be done in order to make a valid location of the property in question under the Miners' Rules and Regulations of Tuolumne County and the Revised Statutes of the United States.

As we have shown that the location of Coyle was void; that the plaintiffs did not perform the $100.00 worth of labor upon the mine, as required by the statutes, it follows that the location of R. S. McWhirter was a valid location and that the lands were at that time open public mineral lands of the United States.

In conclusion we submit:

First. That Walter J. Coyle never made a valid location of the Slap Jack Mine and that these plaintiffs never acquired any right to the property and on January 1st, 1899, the claim was open, public, mineral land.

Second. That, assuming, for the sake of argument, that defendants in error had title to the claim, yet for the year 1898 the assessment work was not done and for that reason on January 1st, 1899, it became open, public mineral land subject to location.

Third. That the evidence shows there was no resumption on December 31st, 1898, and for that reason the claim was open to relocation on January 1st, 1899; but assuming that Boynton did cut willows along the northeast boundary of the claim on the last day of the year 1898, yet that was not assessment work, done exclusively on the vein or lode in the development thereof as provided by the local rules and regulations of Tuolumne County (Trans. page 79.) And for that reason the claim was open for relocation on January 1st, 1899.

The judgment should be reversed and the lower court directed to enter judgment in favor of the plaintiff in error, for the reasons hereinbefore set forth.

Respectfully submitted,

A. H. JARMAN,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 69.

YOSEMITE GOLD MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

E. L. EMERSON ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

The plaintiff in error seeks by this proceeding to have the decision of the Supreme Court of the State of California in this case reviewed by this court.

Before proceeding with a discussion of the merits of the controversy we desire to challenge the jurisdiction of this court to hear or determine any of the matters presented upon this writ of error, for the reason that no question arising under a federal statute was decided by the State court, and consequently there is no federal question for this court to review.

An examination of the record will show that the decision sought to be reviewed was rendered upon a second appeal in this case, the judgment rendered by the lower court on the first trial having been reversed and the cause remanded for a new trial (Emerson *vs.* McWhirter, 133 Cal., 510).

Upon the coming down of the remittitur the plaintiff in error here was substituted as a defendant in the place of

R. S. McWhirter, and the defendants in error in this proceeding were by order of the court permitted to file a supplemental complaint. The second trial was had upon the issues raised by the original pleadings, as well as those presented by the supplemental complaint, and judgment was rendered in favor of the defendants in error. The plaintiff in error thereupon appealed to the Supreme Court of the State of California from the judgment so entered, and this judgment was affirmed in so far as it affects the questions now sought to be reviewed by this court (Emerson *vs.* Yosemite G. M. & M. Co., 149 Cal., 50).

It will be observed that the State court did not, in its decision upon the second appeal, pass upon any federal question whatever, but rested its decision entirely upon the law of the case. It stated emphatically that all of the questions sought to be reviewed here were presented and determined upon the first appeal, and that its former decision upon these questions is now the law of the case.

If the plaintiff in error desired to have this court review any federal questions that may have been involved, it should have done so by a writ of error to the Supreme Court of California from the decision of that court upon the first appeal. But, having failed to do so, and having submitted to a second trial in the State court upon the merits, and having appealed from the judgment rendered adversely to it therein, and the Supreme Court of California having based its decision, on the second appeal, entirely upon the law of the case, we submit that the plaintiff in error is now concluded by the decision of the State court upon the first appeal, and that whatever federal questions were involved have now passed *in rem judicatem*.

The rule is very well settled that, in order to give this court jurisdiction of a writ of error to a State court, it must affirmatively appear not only that a federal question was presented for decision to the highest court of the State, and that its decision was necessary to a determination of the case,

but it must also appear affirmatively that such federal question was actually decided, or that the judgment rendered could not have been given without deciding it.

Cook County *vs.* Calumet, &c., Co., 138 U. S., 635-651, and cases cited.

Eustis *vs.* Bolles, 150 U. S., 361-366.

Moran *vs.* Horsky, 178 U. S., 205-208.

Although title may be claimed in the State court under a federal statute, still, if the decision rests on a ground independent of the statute and involving no federal question, the writ of error will be dismissed.

Cockran Oil Co. *vs.* Arnaudet, 199 U. S., 182.

In the case of Moran *vs.* Horsky, *supra,* this court dismissed the writ of error for the reason that the decision of the State court was based upon the doctrine of laches, and therefore it involved no question under the federal statutes.

And in Speed *vs.* McCarthy, 181 U. S., 269, the State court disposed of the case upon the question of estoppel, and this court held that it had no jurisdiction to review the decision, because the decision of the State court did not rest upon the disposition of a federal question.

Nor can the certificate of the presiding judge of the State court, made after the decision of a case in that court, to the effect that a federal question was considered and decided, confer jurisdiction upon this court where the record does not otherwise show it to exist.

Marvin *vs.* Trout, 199 U. S., 212-223.

The Supreme Court of California did not in the present case decide any federal question, but based its decision entirely upon the doctrine of the law of the case. As this does not present a question under any federal statute, we submit that there is nothing for this court to review.

The very function of a writ of error is to review a federal question decided by a State court. If the State court decides no federal question, but bases its decision upon principles of law independent of any federal statute, it leaves absolutely nothing to be reviewed by this court. That is precisely what was done in this case.

Many other cases might be cited upon this point, but the question seems so elementary and is so completely disposed of in the foregoing decisions that we deem the citation of further authorities unnecessary. For these reasons we submit that the writ of error should be dismissed.

Assuming, however, for the sake of the argument, that federal questions are presented here for review, and that this court has jurisdiction, still we submit that the judgment of the trial court and of the State Supreme Court should be affirmed.

The first contention of counsel for plaintiff in error is that the evidence is insufficient to justify the decision of the *nisi prius* court that Walter J. Coyle, the grantor and predecessor in interest of the defendants in error, made a valid location of the mining claim in controversy.

This contention is based upon the fact that Mr. Coyle in locating the "Slap Jack Mine," posted but one notice of location upon the claim instead of two, as required by the local rules of the Tuolumne Mining District.

The trial court found that Walter J. Coyle took all of the steps necessary and essential to make a valid location of the "Slap Jack Mine" (Trans., folio 36).

No attack is made upon the sufficiency of the evidence to sustain this finding, even if it could be made in this court, but counsel claims that Coyle forfeited all of his right to the Slap Jack Mine because he posted but one notice upon the claim at the time of his location, whereas the rules of the local mining district required two notices to be posted.

While it is true the mining rules of the district provide for the posting of two notices on a claim as an act of location,

still these rules do not require the notice to remain posted continuously. It is a matter of common knowledge, of which the court will take judicial notice, that a notice posted on a mining claim is not, in the nature of things, a permanent notice, nor is it intended to be such. The only function of a location notice is as a temporary protection to the locator while he is performing the other acts of location, including the marking of the claim on the ground so that its boundaries can be readily traced, which is the essential prerequisite of location.

Donohue *vs.* Meister, 88 Cal., 121.
Gleeson *vs.* Martin White Co., 13 Nev., 464.

After a claim has been marked on the ground and after the notice has been recorded, the notice posted on the claim has served its purpose, and it then becomes *functus officio*. Thereafter it is immaterial whether one notice or a dozen had been posted.

Besides, the mining rules of the Tuolumne Mining District do not provide a penalty for a failure to post two notices; consequently that requirement is simply directory and does not operate as a forfeiture of title.

This question has frequently been the subject of judicial inquiry, and the rule is now well settled that the failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto unless the rule itself so provides.

Emerson *vs.* McWhirter, 133 Cal., 511.
McGarrity *vs.* Byington, 12 Cal., 426.
Bell *vs.* Red Rock T. & M. Co., 36 Cal., 214.
Rush *vs.* French, 1 Ariz., 99.
Johnson *vs.* McLaughlin, 1 Ariz., 493.
Jupiter M. Co. *vs.* Bodie M. Co., 11 Fed. Rep., 666.
Flaherty *vs.* Gwinn, 1 Dak. Append., 509.

Nor can it be perceived how either the plaintiff in error or its grantor, McWhirter, was in any way injured by the failure of Coyle to post two notices. The attempted location of McWhirter was made three years after Coyle had made his location, recorded his notice, and marked his claim on the ground so that the boundaries thereof could be readily traced; and the evidence shows conclusively that McWhirter knew the corners and boundaries of the Slap Jack Mine at the time he attempted to "jump" it. He testified:

> "I knew the Jim Blaine Mine, formerly the Slap Jack Mine. I went on the property first on Saturday, December 31st, 1898. I went with James Paul. I looked over the ground. *Mr. Paul showed me the boundaries of the claim. I ascertained the different points of the claim and the monuments.* * * * *When I attempted to locate the claim known as the Jim Blaine Mine I was attempting to 'jump' or relocate the Slap Jack Mine.* The ground embraced within the exterior boundaries of the Jim Blaine Mine was the same ground included within the exterior boundaries of the Slap Jack Mine. When I was on the ground on December 31, 1898, I knew the boundaries of the Slap Jack Mine. They were pointed out to me by Mr. Paul on December 31, 1898" (Trans., folios 109-122-123).

McWhirter had all the actual knowledge which any number of notices could have given him, when he attempted to relocate the ground. What further purpose could be subserved by the posting of the second notice? Manifestly none.

The construction to be given to the local rules and regulations of miners was considered by the Supreme Court of California in Donohue *vs.* Meister, 88 Cal., 121. In that case the defendant posted his notice of location, which was written upon one side of a sheet of paper, upon a mound of rocks three feet high, and folded it with the writing inside, and placed two flat rocks upon the notice, so that about three-fourths of an inch of the margin of the paper was exposed

to view, the rest of the paper being obscured by the two stones which covered it. The lower court held that the notice was not conspicuously posted, because the local rules of Nevada County required notices of location of quartz claims to be in writing and to be posted conspicuously, in a conspicuous place, upon the claim located, and for this reason held that the entire location was void.

The Supreme Court reversed the judgment of the lower court, and in disposing of the case on appeal says:

> "A substantial compliance with mining customs where good faith is shown is certainly sufficient. It appears that various devices were resorted to by the miners in the district to protect their notices from the weather. The method which defendant adopted is certainly not more objectionable than folding it 'in a box.' The artificial mound of rocks on the line of the lode is a conspicuous object, which would naturally attract the attention of one seeking information as to a former location of the lode, and the slightest examination of the mound would result in the discovery of the written notice. Plaintiff should have seen it, *and if he did see it, and had the actual knowledge which it gave, but concluded to take advantage of what he deemed a defect in the* **manner** *of posting, the technical point which he thus made is entitled to but little consideration.*
>
> "It does not appear how much labor and money defendant expended on his claim during the several years preceding plaintiff's entry, except that he expended more than was necessary to comply with the law. But if he had expended large sums of money in developing the mine, and had sold interests to others at high prices, the proposition to forfeit it all, because he partly covered his original notice with two stones to protect it from the weather, would we think, have appalled either judge or jury. But the above view is greatly strengthened when we reflect that, under the laws of Congress, *the original notice cuts but little figure after the other acts necessary to the valid location of the mining claim have been done.*

"The notice is valuable chiefly as a temporary protection to the locator while the other acts are being performed.

"Under the law of Congress, 'distinctly marking the location upon the ground so that the boundaries may be readily traced' is necessary and is the main act of original location (Holland *vs.* M. A. G. Q. Co., 53 Cal., 149).

"In Gleeson *vs.* Martin White Co., 13 Nev., 464, Beatty, J., delivering the opinion of the court, speaks of congressional legislation on the subject as introducing a system in which the preliminary posting and recording of notices is entirely out of place, *except as a means of protecting a claim during the time necessary for tracing the ledge and marking the boundaries of the location.*

"When the location is thus marked, all that the notices and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete.

"We quote the above remarks, not to the point, that a mining custom requiring the posting of a notice in a particular way can be wholly disregarded (which is not necessary here to be decided), but as showing additional reasons why such a custom, when invoked years after all other acts of location have been done, *should receive a liberal and not a strict construction.*"

What was said in that case applies with equal force in this, because the principle involved is essentially the same in each case. In the case cited it was sought to deprive the defendant of his mining claim upon the technicality that he had not posted his notice of location in a conspicuous place, as required by the mining rules. In the present case it is sought to deprive defendants in error of their mining claim upon the technicality that only one notice was posted, and the local rules required two notices to be posted, although it does not appear that any person was injured by the failure to post the second notice, or that any additional

purpose would be accomplished if the two notices had been posted. As was said by Mr. Justice McFarland in Donohue *vs.* Meister, *supra:*

> "The technical point thus made is entitled to but little consideration."

And in the later case of Talmadge *vs.* St. John, 129 Cal., the Supreme Court of California, quoting with approval the language of Mr. Justice Sawyer in Mt. Diablo M. Co. *vs.* Callison, 5 Saw., 439, says, at page 436 of the opinion:

> "The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, *whatever does this fairly and reasonably should be held a good notice.* Great injustice would follow if years after a miner had located a claim and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism. * * * Moreover when the plaintiff went upon the ground he was confronted with ample evidence touching its occupancy and prior location."

In the case now before the court McWhirter was confronted with ample proof of the prior location of the ground in controversy and of the occupancy by the defendants in error at the time he attempted to make a relocation thereof. The monuments of the defendants in error were to be seen upon the ground, and McWhirter testified that they were pointed out to him, and that he knew the exterior boundaries of the claim and knew that the ground was claimed by the defendants in error; and he also knew that J. E. Boynton, an employee of the defendants in error, was then in possession of the property and was holding it for them.

We submit, therefore, that when McWhirter attempted to relocate the Slap Jack Mine he had all the knowledge and information concerning the prior location thereof which he could possibly have obtained if a dozen notices were posted

upon the claim. He was not, and could not, therefore, be injured or misled in any way by the failure of Coyle to post the second notice.

Besides, the mining rules were enacted by the miners for their own protection and should be liberally construed so as to effectuate that purpose. As was said by the Supreme Court of California in Talmadge *vs.* St. John, *supra:*

> "In construing notices like these it must be remembered that, as a rule, miners are unacquainted with legal forms and requirements and are frequently out of the reach of advice; and in view of this it has been wisely held that their proceedings ought to be regarded with indulgence and liberally construed."

It certainly was not intended by the framers of these rules that they should be given such a hypertechnical construction as would enable a midnight marauder to despoil a locator of the fruits of his industry, as is sought to be done in this case. That is not *con*struction, but is *de*struction.

In the recent case of Lawson *vs.* United States Mining Company, decided October 21, 1907, this court says that "a discovery is the all-important fact upon which title to mines depends"; and, quoting from Judge Lindley's work on Mines, continues:

> "Discovery, in all ages and in all countries, has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries, the great consideration for granting mines to individuals is *discovery*. 'Reward so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the State depends.'"

And the court then adds:

> "The two thoughts here presented are reward for the time and labor spent in making the discovery, thus adding to the general wealth, and incentive to others to prosecute search for veins and mines. To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery and without any previous searching for minerals is manifest injustice."

In that case the court was considering a broad apex which was not all embraced within one location, but a portion of which was included within an adjacent parallel claim. The principle involved and the inherent right of the first locator to be protected in his discovery is substantially identical in both cases. The injustice of taking from the prospector, who braved the dangers and hardships of the mining regions and who discovered a valuable mining claim, the reward which Congress intended to bestow upon him for his discovery and give it to another, who is attracted by the discovery made by the first locator and who made no previous search for minerals, simply because the first locator, through an oversight, posted but one notice on his claim instead of two, as required by the local rules, particularly where the attempted relocator admits that he had all the knowledge and information which the posting of a second notice could possibly have given him, is, we submit, so perfectly obvious that a mere statement of it is sufficient. These hypertechnicalities might suggest themselves to a lawyer, but they never occur to the poor prospector while he is penetrating into inaccessible places for the purpose of discovering and locating mines.

The courts of the mining States, both Federal and State, are familiar with the situation and environments of the prospector and miner and they take judicial notice of the fact that he is unacquainted with legal forms and usually out of the reach of legal advice, and uniformly hold that his acts of

location should be regarded with indulgence and liberally construed where good faith is shown. They recognize the great injustice that would follow if the acts of a miner were to be subjected to a microscopical examination, years after he made his discovery and location and after the mine has become valuable through his labor and industry, by those who are interested in stripping him of the fruits of his discovery. They are ever mindful of that wise policy of the law which requires the powers of the courts to be freely and liberally exercised so as to dispose of cases upon their substantial merits, regarding mere technicalities, in derogation of substantial rights, as obstacles to be avoided rather than as principles to be observed and followed.

Furthermore, the question of the sufficiency of Coyle's location was involved in the decision of the Supreme Court of California upon the first appeal (Emerson *vs.* McWhirter, 133 Cal., 510), and the court there fully considered the local rules of the miners and squarely decided that the failure of Coyle to post the second notice did not operate as a forfeiture of his title.

Counsel's next contention is that the evidence is insufficient to justify the decision of the trial court that the defendants in error performed $84.90 worth of labor upon said mining claim during the year 1898. It is not claimed that this amount was not expended by the defendants in error for labor performed upon the claim during that year, but it is contended by counsel that this expenditure would not count for the annual labor or assessment work, because it consisted in unwatering the mine, and he says the local rules require the work to be done upon the vein or lode in the development thereof.

The evidence shows, without conflict, that the defendants in error expended at least the sum of $114.90 for labor upon the mine during the year 1898, but the lower court refused to allow as assessment work an item of $30 paid to E. L.

Emerson by his co-owners for his services in directing the work. While it is true that a substantial part of the amount expended was paid for labor performed in unwatering the mine, still it will be observed that the mine was operated by a shaft sunk upon the vein or lode to a depth of about 100 feet, with a drift run from the shaft. We submit, therefore, that this amount was expended for work done and labor performed upon the vein or lode, because it was paid for labor performed in the shaft, and the shaft is sunk upon the vein or lode.

Besides, section 2324 of the Revised Statutes of the United States, which requires at least one hundred dollars' worth of labor to be performed or improvements made annually upon a mining claim, does not provide that the labor shall be performed upon the vein or lode in the development thereof. The act simply provides for the expenditure of one hundred dollars' worth of labor each year upon a mining claim, without designating upon what part of the claim it shall be performed or of what the labor shall consist.

Nor could the miners of the district by enacting rules dispense with the requirements of the statute or impose conditions not made by the act of Congress. Section 2324 of the Revised Statutes, which delegates to the miners of the mining districts power to make regulations, places an express limitation upon their powers by providing that the regulations must not be in conflict with the laws of the United States. It will be observed that there is absolutely nothing in this section which would authorize the miners to require the labor to be performed upon the vein or lode. The act of Congress does not require the labor to be so performed, but permits the labor to be performed upon any part of the mine, or even beyond the limits of the claim, provided it is for the benefit of the mine.

We submit that any attempt on the part of the miners to enact regulations which would require the labor to be

performed upon the vein or lode is clearly in conflict with the act of Congress and therefore void.

Wright *vs.* Killian, 132 Cal., 56.

It has been uniformly held that the performance of any labor upon a mine or for the benefit of the mine would be regarded as assessment work upon it. In the case of Altoona Q. M. Co. *vs.* Integral Q. M. Co., 114 Cal., 100, the court held that money paid to a watchman for his services in looking after the mine and in taking care of the same would constitute annual labor upon the claim sufficient to hold it; and we submit that if the moneys paid to a watchman would constitute assessment work upon the mine, that the expenditure made by the defendants in error in unwatering the mine would certainly satisfy the requirements of the statute.

In discussing the question of the performance of the annual labor upon this mine for the time in question, the Supreme Court of California, in its decision upon the first trial, says:

> "Where a valid location of a mining claim has been made and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally to prevent forfeiture. Indeed, this is the rule generally as to forfeitures. The courts are reluctant to enforce a forfeiture, deeming this class of cases odious in law, and it is well settled by the decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests with the party asserting it."

The same rule was announced by this court in Belk *vs.* Meagher, 104 U. S., 284. The court expressed its decision in the following forcible language:

> "Mining claims are not open to relocation until the rights of a former locator have come to an end. *A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up.*"

In the case now under consideration the defendants in error expended more than one hundred dollars upon the mine during the year 1898; they visited the property twice during the year and sent a man from Santa Clara County, a distance of about two hundred miles, to be present upon the mine before the end of the year and to resume work thereon. This, we submit, clearly overcomes any intention to abandon the property and shows conclusively that the defendants in error acted in good faith in working the mine during the year 1898. Moreover, the court specifically found that the defendants in error worked and operated the mine in good faith and without any intention of abandoning the same (Trans., folios 40-43).

And it will also be observed that the trial court found that the defendants in error resumed work upon the mine on December 31, 1898, and prosecuted said work diligently thereafter until more than one hundred dollars' worth of labor and improvements were performed and made therein *in addition* to the labor performed by them during the year 1898 (Trans., folio 40).

So that if we concede that the defendants in error failed to perform the assessment work during the year 1898, even then we submit that the mine was not forfeited, because the defendants in error resumed work thereon on December 31, 1898, and prosecuted said work diligently thereafter until the requisite amount of labor had been performed.

The act of Congress as well as the law of California provides that if the original locator, his heirs or assigns, resumes work upon the claim and continues said work with reasonable diligence until the required amount of labor has

been performed and improvements made, that the claim will not be subject to relocation because of the previous failure to perform the work.

Revised Statutes of U. S., section 2324.
Statutes of California, 1891, page 219.
Belcher Con. G. M. Co. *vs.* Deferrari, 62 Cal., 163.
Pharis *vs.* Muldoon, 75 Cal., 284.
North Noonday M. Co. *vs.* Orient M. Co., 6 Saw., 299.
McNeil *vs.* Pace, 3 Land Dec. (Dec. of Int. Dept.), 270.
McKay *vs.* McDougall, 64 Pac. Rep., 672.

Counsel for plaintiff in error contend in the third assignment of error in their brief that the evidence is insufficient to sustain this finding. This, we submit, is purely an assumption on their part and is unwarranted by the facts. J. E. Boynton testified that he was sent by the defendants in error to the "Slap Jack Mine" for the purpose of resuming work thereon, and that he arrived at the mine on December 30, 1898; that he commenced work thereon on December 31, 1898, and worked all of that day and every day thereafter, excepting Sundays, until January 10, 1899, when he was joined by Mr. Britton, and that the two worked there together thereafter until more than one hundred dollars' worth of labor had been performed; that they worked thirty-three and one-half days, and that he was paid for his labor at the rate of three dollars per day (Trans., folios 200-202, 182-183).

He is corroborated in his testimony by the witness A. D. Cornwell, who testified that his brother kept a general merchandise store at Groveland, and that he was hauling freight during the Christmas vacation of the year 1898—that is to say, from December 23 to December 31, 1898; that on December 30, 1898, he met Mr. Boynton in front of his brother's store; that Boynton had purchased some provisions at the store, and that the witness delivered to Mr. Boynton his pro-

visions at the "Slap Jack Mine" on the afternoon of December 30, 1898. The witness relates with great detail how he was positive of the date and stated, among other reasons, that he was attending school at Oakdale, and that his school opened on January 2, 1899, and that he left Groveland on the afternoon of December 31, 1898, in order to be able to reach school when it opened, and he knew that it was the day before he left Groveland to return to school that he took Mr. Boynton to the Slap Jack Mine (Trans., folios 188 to 191).

Against the direct and positive testimony of these witnesses counsel for plaintiff in error assumes that the evidence is insufficient to justify the finding of the court, and in support thereof quotes mangled fragments of the testimony of some of the witnesses called by plaintiff in error, by which he undertakes to show that Boynton did not arrive at the mine until December 31, 1898, and did not commence work until January 2, 1899. The lower court did not believe the testimony of the witnesses called by the plaintiff in error, because it found that Boynton did commence work on December 31, 1898, and worked continuously thereafter until the requisite amount of labor had been performed (Trans., folio 40).

Besides, the question of the resumption of labor was considered by the Supreme Court of California in its decision upon the first appeal, and that court squarely decided that there had been a resumption of labor, and that, even if the defendants in error failed to perform the assessment work during the year 1898, the resumption of labor on December 31, 1898, saved the claim from forfeiture.

Emerson *vs.* McWhirter, 133 Cal., 510.

The same question was urged upon the second appeal, and in disposing of it the court says:

> "It cannot be seriously contended that the evidence given upon the second trial was substantially different from that given on the first trial, as to the character of the work and the amount thereof. Under the views

> expressed on the former trial, *which must be accepted here as the law of the case*, the only point upon which there may be a question at all, so far as the finding of the court is concerned, is as to whether plaintiffs resumed work on December 31, 1898, or not until January 2, 1899. Upon this point, however, there can be no real question here, for there was a clear conflict in the evidence. * * * It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal."
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> Emerson *vs.* Yosemite G. M. & M. Co., 149 Cal., 50.

But, independent of either of these considerations, we submit that the attempted relocation of McWhirter was invalid. At the time he attempted to relocate the mining ground in controversy the law then in force required the locator to post and record his preliminary notice of location and within sixty days thereafter to perform fifty dollars' worth of labor in developing his discovery, and to record his certificate of location showing that he had completed all of these acts of location.

> Statutes of California, 1897, page 215.

And the rule is unyielding that an attempted relocator must comply with all of the acts of location before the first location is forfeited.

> Pharis *vs.* Muldoon, 75 Cal., 284, and cases above cited.

In discussing this question in McKay *vs.* McDougal, 64 Pac. Rep., 672, the Supreme Court of Montana, in a well-considered opinion, says:

> "The law contemplates that the location of a mining claim shall consist of a number of distinct acts which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists.

> *The owner of the lode which has become subject to relocation can resume work thereon at any time prior to the performance of all of these acts.* * * * The resumption of labor in good faith by the respondent, before the appellant *perfected* his location, rendered null the prior acts of the appellant. The rule thus stated necessarily results from the signification given to the term 'location' used in the statute (Rev. St. U. S., sec. 2324). * * * In the first paragraph of this opinion we spoke generally of forfeiture as the result of a default on the part of the first locator. *Speaking accurately, it is only by a complete relocation that a forfeiture is wrought.* This statement is fully in accord with Mr. Lindley's views in his text, at page 820, and it is the only logical view. It will not be contended that if A, for example, enters upon a mining claim located by B, which is subject to forfeiture, with the intention to relocate it, and takes one or more of the necessary steps to that end, but abandons his purpose before he completes the relocation, B's rights will be thus effectually forfeited. If Congress had intended this, the idea would doubtless have been expressed by the use of some other term less comprehensive in meaning than the term 'location.' "
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> See also Gonu *vs.* Russell, 3 Mont., 358.
> Honaker *vs.* Martin, 11 Mont., 91.

In Belk *vs.* Meagher, 104 U. S., 282, Mr. Chief Justice Waite, speaking for this court, says:

> "As we think, the exclusive possessory rights of the original locator and his assigns were continued without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and *relocated* the claim, he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred."

Judge Hallett instructed the jury in the United States Circuit Court for the District of Colorado in the case of Min-

ing Co. *vs.* Kimber, 1 Morr. Min. Rep., 536, that a party who fails to work his claim according to the statute has the right before the new claimant has *perfected* his location to re-enter, and upon doing the annual work required by law he would become reinvested with his first estate.

In the case at bar McWhirter did not record his preliminary notice of location until January 4, 1899, and he did not complete the performance of the fifty dollars' worth of labor required by the act of 1897 to be performed as an act of location, and record the same, until January 24, 1899, although it was necessary for him to take and complete all of these steps and acts of location before he could succeed in divesting the defendants in error of their title to the property. If the defendants in error resumed work before all of these acts were performed by McWhirter, it would save their claim from forfeiture, and the attempted relocation thereof by McWhirter would become ineffectual. The evidence shows without conflict that the defendants in error resumed work long before McWhirter completed his location. So that, taking any possible view of the case, we submit that plaintiff in error is not entitled to recover.

Counsel also says that the resumption of labor must take place after the expiration of the last day of the year and before the attempt to relocate is initiated. This, we submit, finds no support, either upon principle or authority. Certainly no case cited by counsel sustains any such contention. On the contrary, the case of McCormick *vs.* Baldwin, 104 Cal., 227, cited by him, is an authority against him. In that case the court defines the phrase "to resume work," within the meaning of section 2324 of the Revised Statutes of the United States, and says that it is to actually begin work anew with a *bona fide* intention of prosecuting it as required by that section, and that the question of whether work done by a prior locator was with such intention is for the jury to determine.

The word "resume" means to take up again after inter-

ruption; to begin again; to proceed after interruption.—*Century Dictionary.*

The defendants in error performed some labor upon the mine during the year 1898, and resumed work on the last day of the year, and continued the work into the year 1899 until they completed the requisite amount of labor.

Section 2324 of the Revised Statutes provides that work may be resumed upon the claim at any time after failure and before relocation. We submit that there is absolutely nothing in the language used in the statute which would warrant the construction placed upon it by counsel, that the resumption must take place after and not before the expiration of the year. Such a construction would surely be taking liberties with the word "resume."

Counsel's last contention is that the evidence is insufficient to justify the decision of the trial court that at the time of the attempted location by McWhirter the ground in controversy was not open to relocation. This contention is based upon the assumption that the title of the defendants in error had been forfeited on account of the failure of Coyle to post two notices upon the claim, and also on account of the alleged failure of defendants in error to perform the assessment work for the year 1898.

As we have already shown, the title of defendants in error was not forfeited for either of these reasons and it is unnecessary, therefore, to go over the ground again. Besides, there cannot be two valid locations upon the same ground at the same time. Only public mineral lands can be entered under the mining laws. Land to which any claim or right of others has legally attached does not fall within the definition of "public lands."

Lindley on Mines, section 112.

In discussing this question in Belk *vs.* Meagher, 104 U. S., the court, at page 284, says:

> "A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. *Hence a relocation on lands actually covered at the time by another valid and subsisting location is void;* and this, not only against the prior locator, but all the world, because the law allows no such thing to be done."

In addition to the reasons above stated, the judgment of the State courts should be affirmed because the question of the sufficiency of Coyle's location of the "Slap Jack Mine" and also the question of the performance of annual labor and the resumption of work were involved in the first appeal to the Supreme Court of California, and the decision of that court upon that appeal is now the law of the case.

It is a familiar principle of law that the ruling by an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case, a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves.

Phelan *vs.* San Francisco, 20 Cal., 39-45.
Lees *vs.* Clark, 20 Cal., 417, and cases cited.
Jaffe *vs.* Skae, 46 Cal., 540.
Heinlen *vs.* Martin, 59 Cal., 181-183.
Sharon *vs.* Sharon, 79 Cal., 687.
Balfour *vs.* Fresno Canal & I. Co., 123 Cal., 395.

And the law applies with equal stringency where the judgment has been reversed on a former appeal of the same state of facts which appear on the second appeal; the decision of the former appeal is also the law of the cause upon the second appeal.

Gould *vs.* Adams, 108 Cal., 365.

The Supreme Court of California in its decision upon the second appeal in this case decided that the facts upon the second appeal were substantially identical with those upon

the first appeal, and in express terms held that its decision upon the first appeal was the law of the case.

Counsel for plaintiff in error has cited a number of cases to sustain the various contentions made by him, but an examination of them will show that the facts and principles involved in all of them are essentially different from those in the case at bar and consequently they can have no possible application to this case.

For these reasons we submit that the writ of error should be dismissed and the judgment of the State court affirmed.

Respectfully submitted,

JOHN E. LASKEY,
Attorney for Defendants in Error.

J. P. O'BRIEN,
Of Counsel.

Mr. W. C. Kennedy, for plaintiff in error. *Mr. A. H. Jarman* was on the brief:

Coyle never made a valid location of the Slap Jack Mine, because he failed to comply with the miners' rules and the regulations of the miners of Tuolumne County, duly made in pursuance of § 2324 of the Revised Statutes of the United States, and this being so the ground at the time of the location by McWhirter was open, public mineral land of the United States.

To make a location of a mining claim under these rules and regulations the United States laws must be followed in reference to marking the boundaries on the ground so that the same may be readily traced, and, in addition thereto, a notice of location must be posted at each end of the claim. When this is done a claim is located, and not before. These initiatory steps must be taken before any right vests in the locator. There must be a vested right of some kind before there can be a forfeiture of that right. A man cannot forfeit that which he has not, or never has had. *Adams* v. *Crawford*, 116 California, 498.

The recording of the notice is not an act of location, but something that follows the acts of location. The acts of location are what are done upon the ground. The local rules of Tuolumne County prescribed what should be done upon the ground in order to make the location, and these rules should have been followed.

The rules so adopted by the miners of the district, except where in conflict with some laws of the United States or of the State of California, being authorized and sanctioned by express statutory enactment, are, when in force, as valid and binding as if they were a part of the statute itself. *Gird* v. *California Oil Co.*, 60 Fed. Rep. 531–534. See also *Howeth* v. *Sullinger*, 113 California, 550; *Carter* v. *Baccigalupi*, 83 California, 188; *Northmore* v. *Simmons*, 97 Fed. Rep. 388; and *Harvey* v. *Ryan*, 42 California, 626.

Miners have the authority of the United States statutes and the law of the State of California, authorizing and empowering

them to make regulations governing the location of a mining claim, and such regulations must be followed, otherwise the attempted location not following such regulations is invalid *ab initio*.

Mr. John E. Laskey, with whom *Mr. J. P. O'Brien* was on the brief, for defendants in error:

After a claim has been marked on the ground and after the notice has been recorded, the notice posted on the claim has served its purpose, and it then becomes *functus officio*. Thereafter it is immaterial whether one notice or a dozen has been posted.

Besides, the mining rules of the Tuolumne Mining District do not provide a penalty for a failure to post two notices; consequently that requirement is simply directory and does not operate as a forfeiture of title.

The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto unless the rule itself so provides. *Emerson* v. *McWhirter*, 133 California, 511; *McGarrity* v. *Byington*, 12 California, 426; *Bell* v. *Red Rock T. & M. Co.*, 36 California, 214; *Rush* v. *French*, 1 Arizona, 99; *Johnson* v. *McLaughlin*, 1 Arizona, 493; *Jupiter M. Co.* v. *Bodie M. Co.*, 11 Fed. Rep. 666; *Flaherty* v. *Gwinn*, 1 Dak. Append. 509.

When McWhirter attempted to relocate the Slap Jack Mine he had all the knowledge and information concerning the prior location thereof which he could possibly have obtained if a dozen notices had been posted upon the claim. He was not, and could not, therefore, be injured or misled in any way by the failure of Coyle to post the second notice.

Mining rules enacted by the miners for their own protection should be liberally construed so as to effectuate that purpose. *Talmadge* v. *St. John*, 129 California, 430.

It was not intended by the framers of these rules that they should be given such a hypertechnical construction as would enable a midnight marauder to despoil a locator of the fruits

of his industry. *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

MR. JUSTICE DAY delivered the opinion of the court.

This case originated in an action brought to quiet title to a certain mining claim called the Slap Jack Mine situated in Tuolumne County, California. The case was twice in the Supreme Court of California. In the first trial the Superior Court of Tuolumne County gave judgment in favor of the then defendant McWhirter; on appeal this judgment was reversed. 133 California, 510. After the case went back the present plaintiff in error, the Yosemite Gold Mining and Milling Company as the successors in interest to McWhirter and defendants Argall, was made a defendant.

As to the Argall interest, covering nine-twentieths of the property, based on the same location, while judgment was rendered in the court below as to this interest against the present plaintiff in error, in the Supreme Court a new trial was awarded and the case remanded, and with that interest we have nothing to do upon this writ of error.

As to the remaining eleven-twentieths, the court rendered a final judgment against the present plaintiff in error, Yosemite Gold Mining and Milling Company, decreeing that the defendants in error F. F. Britton and Anne L. Emerson were each the owner of one undivided fourth part of the claim, and defendant in error Miller the owner of the one undivided twentieth part thereof. 149 California, 50. To this judgment the present writ of error is prosecuted.

We proceed to examine the questions which are now in this court. The mining claim of the Yosemite Gold Mining and Milling Company, plaintiff in error, is based upon the attempted location thereof within the same limits as the original Slap Jack Mine, made by McWhirter on January 1, 1899, shortly after midnight. McWhirter undertook to "jump" the former claim upon the theory that the assessment work for the year

1898 required by § 2324, Rev. Stat., as amended in 1880, 21 Stat. 61, 2 U. S. Comp. Stat. 1426, had not been done.

The first contention made by the plaintiff in error is that one Coyle, under whom the defendants in error claim title, never made a valid location of the mining claim, because he posted but one notice of location upon the claim. Under the authority of § 2324, Rev. Stat., *supra*, the miners of every mining district are given authority to make regulations not in conflict with the laws of the United States or any State or Territory in which the district is situated. 2 Comp. Stat. 1426. Section 3 of the Mining Rules and Regulations of Tuolumne Mining District of Tuolumne County, California, provides:

"SEC. 3. Mining claims hereafter located in said district upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner, to wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim. Said notice may be in the following form, to wit:

"'Notice is hereby given that the undersigned have taken up — hundred feet of this vein or lode, and that the claim so taken up is described as follows: (Here insert description.) Dated — day of ——, 18—.

"'A. B.

"'C. D.'"

The Supreme Court of California held that its decision in the present case upon this question was concluded by the ruling made upon the first appeal, which decision continued to be the law of the case. Upon the first appeal (133 California, 510) it was held that the failure to comply with the mining